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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 338

FRANK H. DOHANY, APPELLANT,

vs.

FRANK F. ROGERS, STATE HIGHWAY COMMISSIONER FOR THE STATE OF MICHIGAN, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

FILED AUGUST 22, 1929

(34,469)

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[fol. 1]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

In Equity. No. 3118

FRANK H. DOHANY, Plaintiff,

vs.

FRANK F. ROGERS, State Highway Commissioner for the State of Michigan; The Detroit, Grand Haven & Milwaukee Railway Company, a Michigan Corporation, and the H. W. Nelson Company, of Chicago, Illinois, a Foreign Corporation, Defendants

DOCKET ENTRIES

Dec.	3,	1928. Bill of Complaint filed.
"	"	" Chancery Subpœna issued.
"	"	" Copies of Subpœna made for service
"	4,	" Restraining Order and Order to Show Cause, Returnable Dec. 17, 1928, filed and entered. Tuttle, Simons, Moinet, Judges.
"	7,	" Chancery Subpœna returned served, filed.
"	"	" Marshal's return on service of Bill of Complaint—filed.
"	"	" Marshal's return on service of Restraining Order and Order to Show Cause—filed.
"	11,	" Marshal's return on Chancery Subpœna served on Fred W. Green, Governor, Dec. 4/28—filed.
"	"	" Marshal's return on Bill of Complaint served on Fred W. Green, Governor, Dec. 4/28, filed.
"	"	" Marshal's return on Restraining Order and Order to Show Cause, served on Fred W. Green, Governor of State of Michigan, December 4, 1928, filed.
"	13,	" Appearance of Frank F. Rogers by Wilber M. Brucker, Atty. General, Kit F. Clardy,

[fol. 2] Asst. Attorney General, filed.

Dec. 17, 1928. Hearing on Order to Show Cause continued to January 21, 1299. Simons, Judge.
Jan. 3, 1929. Answer of Frank F. Rogers, filed.
" 10, " Answer and Motion to Dismiss of D. G. H. & M. Ry. Co., & H. W. Nelson Co. filed. Hearing Jan. 21, 1929.
" 11, " Notice of hearing January 21, 1929, on Motion to Dismiss—filed.
" 21, " Hearing on Order to Show Cause and Motion to Dismiss, with leave to file briefs in ten days. Hickenlooper, Tuttle & Moinet, Judges.
June 25, " Opinion recommending that temporary restraining Orders be dissolved and Bill of Complaint dismissed—filed. Tuttle, J. & Moinet, J.
" " " Decree vacating Temporary Restraining Order and Dismissing Bill of Complaint entered.
July 24, " Assignment of Errors filed.
" " " Petition for Appeal filed.
" " " Order allowing Appeal filed and entered. Tuttle, J.
" " " Bond of Frank H. Dohany in $500.00 on Appeal filed.
" " " Citation issued returnable August 24, 1929.
Aug. 3, " Præcipe indicating the portions of the record to be incorporated into the transcript and notice thereof—filed.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT—Filed Dec. 3, 1928

To the Judges of the District Court of the United States for the Eastern District of Michigan, Southern Division:

Frank H. Dohany, a citizen of the State of Michigan, residing in the City of Detroit, and County of Wayne, brings this, his Bill of Complaint against Frank F. Rogers, State

Highway Commissioner for the State of Michigan; the Detroit, Grand Haven & Milwaukee Railway Company, a Michigan Corporation; and the H. W. Nelson Company, of Chicago, Illinois, a foreign corporation, and therefore Plaintiff says:

[fol. 4]

I

That Plaintiff, Frank H. Dohany, is, and for many years last past has been, the owner of a parcel of land, consisting of seventy-two acres, and situated in the Northeast Quarter of Section 31, Troy Township, Oakland County, Michigan.

II

That on the 6th day of April, A. D. 1928, he received through the mail the following notice with the following certificate attached, containing a correct description of the portions of said parcel of land proposed to be taken and utilized for general railway purposes:

"Notice of Hearing

In the Matter of Necessity of the Construction and Improvement of Project in Oakland County, Michigan

To all those who now possess, or claim to possess, any right, title, or interest in the property or properties hereinafter described:

This is to advise you and each of you that it is proposed to construct and improve and to complete the construction and improvement of the State Trunk Line Road known as U. S. No. 10, also known as Woodward Avenue, from the county line between Wayne and Oakland Counties, Michigan, to the city of Pontiac, Michigan, in accordance with the plans and specifications now on file in the office of the State Highway Department and the Secretary of State, and known as State Highway Department Project No. M-063.3, being the project authorized and declared necessary by Act No. 340, of the Public Acts of 1927 of the State of Mich-

[fol. 5] igan, and more particularly described in a certain written contract dated July 20, 1927, between the State of Michigan, and the Detroit, Grand Haven & Milwaukee Railway Company, on file in the office of the Secretary of State at Lansing, Michigan.

It appears that you possess an interest in the hereinafter described parcels of land which it is necessary to acquire in order to provide for the construction and improvement of the project.

You are hereby notified that I will be present at the office of E. B. Howarth, 106 Howarth Building, Royal Oak, Michigan, at 8 o'clock in the forenoon, Central Standard Time, Saturday, April 14, 1928, for the purpose of hearing objections to the necessity for the proposed construction and improvement and the necessity of taking those particular parcels of land therefor.

Frank F. Rogers, State Highway Commissioner in and for the State of Michigan.

Dated at Lansing, Michigan, this 5th day of April, A. D. 1928.

Property of Frank Dohany

A parcel of land in the West ½ of the N. E. ¼ of Section 31, T. 2 N. R. 11 E., Oakland County, Michigan, more particularly described as follows:

Beginning at a point on the West line of lands owned by Frank Dohany (which is also the East line of the Birmingham Gardens Subdivision)—said point being distant Southerly 815.3 feet from the North line of said Section 31; thence in a Southeasterly direction on a curve to the right having a radius of 22,961.83 feet through a central [fol. 6] angle of 3°-3′ a distance of 1,220.4 feet to a point on the Easterly North and south ⅛ line of said Section 31 which point is distant Northerly 151.8 feet from the S. E. corner of said Frank Dohany property, which is also the N. E. corner of the Sheffield Estates Subdivision No. 1; thence Southerly along the said Easterly North and South ⅛ line a distance of 151.8 feet to the said S. E. corner; thence Westerly along the South line of said Frank Dohany's property making a Northwesterly angle of 90°-04′ with said last described course a distance of 260.42 feet to a point; thence in a Northwesterly direction on a curve to the left having a radius of 22,661.83 feet through a central angle of 1°-54′-20″ a distance of 753.26 feet to a point on the West line of said Frank Dohany's property, which point is distant Southerly 1,358.3 feet from the North line of said Section 31; thence Northerly along the West line of

said Frank Dohany's property a distance of 543.0 feet to the point of beginning; containing an area of 7.250 acres more or less.

Property of Frank Dohany

No. 1. All that part of that parcel of land described as: Beginning at a point on the East and West ¼ line of said Section 31, which is distant Westerly 769.18 feet from the East line of said Section 31; thence extending Westerly along said East and West ¼ line a distance of 347.52 feet to a point which is distant Easterly 201.5 feet from the Easterly North and South ⅛ line of said Section; thence Northwesterly on a line which makes a Northwesterly angle of 59°-46′ with the said East and West ¼ line a distance of 360.4 feet to the beginning of a curve; thence continuing Northwesterly on a curve to the left having a radius of 22,661.83 feet through a central angle of 00°-07′ a distance [fol. 7] of 46.4 feet to a point on the said Easterly North and South ⅛ line which point is distant Northerly 351.2 feet from the East and West ¼ line of said Section; thence Northerly along the said Easterly North and South ⅛ line a distance of 595.6 feet to a point, which point is Northerly 151.8 feet from the N. E. corner of the Sheffield Estates No. 1 Subdivision; thence Southeasterly on a curve to the right having a radius of 22,961.83 feet through a central angle of 1°-24′-21″ a distance of 563.2 feet to a point of tangency; thence continuing Southeasterly on the tangent to the curve at said point a distance of 535.35 feet to the point of beginning; containing an area of 5.184 acres more or less, which lies within the North ½ of the Southeast ¼ of the Northeast ¼ of Section 31, Town. 2 North, Range 11 East, Oakland County, Michigan.

State of Michigan,
County of Ingham, ss:

I, Frank F. Rogers, State Highway Commissioner, do hereby certify that I have compared the foregoing copy with the original of record in my office, and that the same is a correct transcript therefrom, and the whole of such original.

In testimony whereof, I have hereunto set my hand at the City of Lansing, this 5th day of April, A. D. 1928.

Frank F. Rogers, State Highway Commissioner."

III

That a hearing was had on the 14th day of April, A. D. 1928, before said Frank F. Rogers at the hour and place set [fol. 8] forth in said Notice, at which time testimony was taken, from which the following facts were disclosed:

(a) that said Frank F. Rogers, State Highway Commissioner, was seeking to acquire a right-of-way for said Detroit, Grand Haven & Milwaukee Railway Company for its use, and also for yards, side-tracks and switches, and all in conformity with the terms of a certain contract entered into between the State of Michigan and the said Detroit, Grand Haven & Milwaukee Railway Company, said contract being set forth and included as a part of Act No. 340, of the Public Acts of 1927, of the State of Michigan, a true copy of said contract being hereto attached and marked Exhibit "A";

(b) that said property sought to be acquired was over three-fourths of a mile East of Woodward Avenue, known as State Trunk Line U. S. No. 10, and that it was being obtained for the purpose of making a trade with the said Detroit, Grand Haven & Milwaukee Railway Company for its present right-of-way along the Easterly side of said Woodward Avenue;

(c) that the proceedings were being conducted in conformity with the so-called "Highway Condemnation Act," being Act No. 352 of the Public Acts of 1925, as amended by Act No. 92, of the Public Acts of 1927 of the State of Michigan, and by authority of Act No. 215 of the Public Acts of 1925 of the State of Michigan, which said "Highway Condemnation Act" permits the allowance and awarding of damages to the owner only for land actually taken for highway purposes, and does not authorize the allowance of any consequential damages, or damages for a diminution of the value of the remainder of the tract of land from which said land for right of way is taken;

[fol. 9] (d) that the tracks, side-tracks and yards of said Detroit, Grand Haven & Milwaukee Railway Company, consisting of approximately twelve tracks, would cross the Westerly portion of the land of this Plaintiff at an acute angle, and at an average elevation of approximately ten

feet above the ground level; that said tracks and yards would extend at said elevation for a distance of four thousand feet in a Southeasterly direction from Maple Avenue to Clawson Road; which public highways are the Northerly and Southerly boundaries of said Section 31, and continuing beyond the Southerly end of said proposed yard, said elevated main line roadbed would extend at a much greater elevation to and beyond Clawson Road; that the Plaintiff's property, which is in the Northeast quarter of said Section of land, would be entirely shut off from approach to Woodward Avenue, and to the Village of Birmingham by said elevated yards and main line roadbed, except by going in a roundabout way over either said Maple Avenue or said Clawson Road;

(e) that in the breaking up and making up of drags and trains in said yard, and also in the passing of trains on the main line tracks, there would be continuously a large volume of smoke, cinders, dust, steam, et cetera, produced by and emitted from the locomotives and trains, and also that there would be continuous vibration, noise and other damaging features to the surrounding territory;

IV

That on the 20th day of April, A. D. 1928, this Plaintiff received through the mail from the Defendant, Frank F. Rogers, State Highway Commissioner, the following document:

[fol. 10] "Determination of Necessity and of the Damages to be Paid as Compensation for the Taking of Private Property for Public Highway Purposes

State Highway Project No. M-063-3

I, Frank F. Rogers, State Highway Commissioner in and for the State of Michigan, by virtue of the authority vested in me by law; and after a hearing on the matters herein mentioned, held in the office of E. B. Howarth, in the Howarth Building, in the City of Royal Oak, Michigan, and adjourned to the City Hall in said City by mutual agreement of all present, on April 14, 1928, of which hearing, in accordance with the statutory provisions made and provided,

notice was given of the time and place thereof to all persons interested, so far as known, in the property hereinafter described, desired for the purpose herein specified, at least seven (7) days before the time of said hearing, as appears by proofs of service of said notice on each of said persons, on file in my office in the City of Lansing, Michigan, all in the manner prescribed by law; and after hearing all persons present; and after due consideration thereof; and being fully advised in the premises, do hereby determine—

1. That it is necessary to construct and improve, and to complete the construction and improvement of the public highway known as U. S. Road No. 10, also known as Woodward Avenue, from the county line between Wayne and Oakland Counties, Michigan, to the City of Pontiac, in accordance with plans and specifications therefor on file in my office in the City of Lansing, Michigan, designated as State Highway Department Project No. M-063-3.

[fol. 11] 2. That it is necessary to acquire for such public highway purpose the fee simple title in and to the several parcels of land hereinafter specifically described, for the purchase of which I hereby declare that I have been unable to agree with the owners and persons otherwise interested therein, said land being desired by me, as such State Highway Commissioner, and by the State of Michigan, to exchange for other property which I hereby determine it is necessary to acquire for said public highway purpose, to-wit: The present railway right of way of the Detroit, Grand Haven & Milwaukee Railway Company from its Milepost No. 13 in the City of Royal Oak, Michigan, to its Milepost No. 22.1 in Bloomfield Township, all in Oakland County, Michigan, in accordance with a certain written contract, providing for such exchange, between the State of Michigan and said Detroit, Grand Haven & Milwaukee Railway Company, dated July 20, 1927, and Act No. 340 of the Public Acts of 1927 of the State of Michigan.

3. That the description of each of said parcels of land to be acquired for said public highway purpose, as aforesaid, the damages which, in my opinion, should be paid as compensation for the taking of each parcel of such property,

after deducting the benefits accruing to the owners of each of said parcels of land by reason of the improvement, as hereinafter indicated, and the name of each person interested in each such parcel, so far as known, are as follows:

Group "K"

Property of Frank H. Dohany

A parcel of land in the West ½ of the N. E. ¼ of Section 31, T. 2 N. R. 11 E., Oakland County, Michigan, more particularly described as follows:

[fol. 12] Beginning at a point on the West line of lands owned by Frank Dohany which is also the East line of the Birmingham Gardens Subdivision, said point being distant Southerly 815.3 feet from the North line of said Section 31; thence in a Southeasterly direction on a curve to the right having a radius of 22,961.83 feet through a central angle of three degrees, three minutes, a distance of 1220.4 feet to a point on the Easterly North and South ⅛ line of said Section 31, which point is distant Northerly 151.8 feet from the S. E. corner of said Frank Dohany's property which is also the N. E. corner of the Sheffield Estates Subdivision No. 1; thence Southerly along the said Easterly North and South ⅛ line a distance of 151.8 feet to the said S. E. corner; thence Westerly along the South line of said Frank Dohany's property making a Northwesterly angle of 90 degrees four minutes with said last described course a distance of 260.42 feet to a point; thence in a Northwesterly direction on a curve to the left having a radius of 22,661.83 feet through a central angle of one degree, fifty-four minutes, twenty seconds, a distance of 753.26 feet to a point on the West line of said Frank Dohany's property, which point is distant Southerly 1,358.3 feet from the North line of said Section 31; thence Northerly along the West line of said Frank Dohany's property a distance of 543.0 feet to the point of beginning; containing an area of 7.250 acres more or less.

Owner: Frank H. Dohany.

Damages: $23,562.50.

Property of Frank H. Dohany

No. 1. All that part of that parcel of land described as follows:

Beginning at a point on the East and West ¼ line of said Section 31, which is distant Westerly 769.18 feet from the [fol. 13] East line of said Section 31; thence extending Westerly along said East and West ¼ line a distance of 347.52 feet to a point which is distant Easterly 201.5 feet from the Easterly North and South ⅛ line of said Section; thence Northwesterly on a line which makes a Northwesterly angle of 59 degrees, 46 minutes with the said East and West ¼ line a distance of 360.4 feet to the beginning of a curve; thence continuing Northwesterly on a curve to the left having a radius of 22,661.83 feet through a central angle of 00 degrees, 07 minutes, a distance of 46.4 feet to a point on the said Easterly North and South ⅛ line which point is distant Northerly 351.2 feet from the East and West ¼ line of said section; thence Northerly along the said Easterly North and South ⅛ line a distance of 595.6 feet to a point, which point is Northerly 151.8 feet from the N. E. corner of the Sheffield Estates No. 1 Subdivision; thence Southeasterly on a curve to the right having a radius of 22,961.83 feet through a central angle of one degree, twenty-four minutes, twenty-one seconds, a distance of 563.2 feet to a point of tangency; thence continuing Southeasterly on the tangent to the curve at said point a distance of 535.35 feet to the point of beginning; containing an area of 5.184 acres more or less, which lies within the North ½ of the Southeast ¼ of the Northeast ¼ of Section 31, Town 2 North, Range 11 East, Oakland County, Michigan, containing about .35 acres.

Owner: Frank H. Dohany.

Damages: $1,137.50.

In witness whereof I have hereunto set my hand this 19th day of April, A. D. 1928.

(Sgd.) Frank F. Rogers, State Highway Commissioner of the State of Michigan."

[fol. 14] V

That said Highway Commissioner allowed this Plaintiff the sum of $3,250.00 per acre for the 7.60 acres of land

actually taken, but in keeping with the terms of said Act No. 352, of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, refused to award Plaintiff any consequential damages, or damages for depreciation in the value of the remainder of the tract from which said land was being taken.

VI

Plaintiff avers that in conformity with the provisions of Sections 5 and 6 of said Act, said Frank F. Rogers, State Highway Commissioner, has taken possession of, and claims title to said 7.60 acres of land, and together with the said Detroit, Grand Haven & Milwaukee Railway Company has entered into contract with the Defendant, H. W. Nelson Company of Chicago, Illinois, for the construction of said Railway and Railway yards and grading roadbed, tracks, et cetera; that said Defendants have already taken control and possession of said property, and have cut standing timber thereon, and have begun grading and building tracks and trestles thereon, all without having made any award or offer of consequential damages, or damages for diminution of value to the remainder of said tract of land.

VII

That your Plaintiff acquired said tract of land approximately fourteen years ago, with a view of retaining the same until the time would arrive when said property would become of value for residential subdivision purposes through the growth and development of the Cities of Detroit and Royal Oak, and the Village of Birmingham; that [fol. 15] he never received one cent of income from said property since he acquired it, but on the contrary has expended many thousands of dollars for taxes and improvements; that practically all of the surrounding and adjoining property has been platted, and lots sold under restrictions for residential purposes, many high class residences having been constructed on lands adjoining your Plaintiff's, and this Plaintiff has intended to so plat and sell his property for the same purposes in the immediate future, but that such residential utility would be wholly destroyed by the construction of said main line tracks and railroad yards through said premises, and its value would be di-

minished to the extent of one hundred thousand dollars ($100,000.00) and upwards.

VIII

That said Act No. 340, Public Acts of 1927, authorizes and empowers Defendant, Frank F. Rogers, to acquire the lands described in said contract for said new right of way on behalf of the State of Michigan by purchase or condemnation, in accordance with the general laws of the State of Michigan, and Defendant, Frank F. Rogers, assuming that Act 215 of the Public Acts of 1925 authorizes him to proceed under either the "Rail way Condemnation Act" so-called, or the "Highway Condemnation Act" so-called, has chosen to proceed under the "Highway Condemnation Act"; that Act 215, Public Acts of 1925, contravenes both the due process of law and the equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States and is therefore unconstitutional; that Act 215, Public Acts of 1925, arbitrarily and capriciously places the Plaintiff in a discriminate class, and deprives him of the priv-
[fol. 16] ileges, rights and immunities preserved to and enjoyed by others under like circumstances and conditions and similarly situated, and would permit the State Highway Commissioner, in this instance, Defendant, Frank F. Rogers, to ultimately acquire for the Defendant, Detroit, Grand Haven & Milwaukee Railway Company, a right of way through Plaintiff's lands, without incurring liability to Plaintiff for consequential damages to the portion of his tract not taken, and other liabilities under the common law and said "Railway Condemnation Act."

IX

That on the 4th day of October, 1928, said Defendant, Frank F. Rogers, pursuant to the provisions of Section 7 of said Act No. 352, Public Acts of 1925, as amended by Act No. 92, Public Acts of 1927, filed a petition with the Probate Court for the County of Oakland, stating that he deemed it necessary to take the fee of said property, and praying for the appointment of three Court Commissioners to appraise the damages to be paid as compensation

for the taking of said 7,600 acres of land; that upon the filing of said petition, and pursuant to the provisions of Section 8 of said Act, the Probate Court for the County of Oakland made an order fixing December 5th, 1928, at 10 o'clock A. M., as the day for the hearing on such petition; that a copy of said petition and order are hereto attached, and marked Exhibit "B."

X

That it has been the contention of the Defendant, Frank F. Rogers, State Highway Commissioner, from the outset, that this Plaintiff was not entitled to any consequential [fol. 17] damages, for the reason that said Statute allowed damages only for the value of land actually taken. That at no time have there been any negotiations between said Defendant and this Plaintiff, looking to the payment of consequential damages for a diminution of value to the remainder of the tract from which 7,600 acres is to be taken. That under the provisions of said Statute, it will be without and beyond the power and duty of said Commissioners to be appointed on the 5th day of December, 1928, by the Probate Court of Oakland County, to award this Plaintiff any consequential damages, which he would otherwise be entitled to if said lands were being taken by any other railroad company in the State of Michigan for railway purposes.

XI

That the general railroad condemnation statutes in Michigan, herein otherwise referred to as the "Railway Condemnation Act," regulating the procedure and determining the tribunal with jurisdiction to hear allegations and proofs, and determine necessity and award damages, in railway condemnation cases, are the following Sections of the Compiled Laws of Michigan, 1915, with the material substance of each:

(a) Section (8249) provides that whenever any lands are condemned to the public use, by any railroad, under the provisions of the Act, such company shall pay to the owners and others interested in the lands condemned, in addition to the damages and compensation awarded by the jury,

a reasonable attorney fee to be fixed and determined by the court, and when the report or verdict is confirmed and the attorney fee so allowed, together with witness fees and other costs and expenses to be taxed in civil actions, shall be paid, tendered or deposited, with the damages or com- [fol. 18] pensations as otherwise provided, before such company shall have any right to enter upon or take possession of the lands condemned.

(b) Section (8250) provides that for the purpose of acquiring title to such lands such company may present a petition to any court of record for the county praying for the appointment of three commissioners.

(c) Section (8254) provides that the land owner shall have the right of trial by a jury of twelve freeholders of the county in which the lands are situated, to ascertain and determine the necessity for taking such land and to appraise and determine the damages or compensation to be allowed therefor;

(d) And further provides that the court shall direct the Sheriff or any Constable of the County to make a list in writing of 24 inhabitants of the county qualified to serve as jurors in the courts of record of this State. Such Sheriff or officer shall, before he proceeds to make such list, be sworn by the court or the judge to select such persons according to his best judgment and without favor or partiality to either party;

(e) And further provides that a jury shall be struck by the petitioner striking off six names and the respondent striking off six names;

(f) And further provides that both the petitioner and the respondents may exercise the right of challenge for cause;

(g) And further provides that the demand of any one of the respondents for a jury shall be deemed to be a demand for all.

(h) Section (8255) provides that the jury shall proceed to ascertain and determine the necessity of taking and using any said real estate or property for the purposes pro-

posed, and if they deem the same to be necessary, to ascer-
[fol. 19] tain and determine the damages and compensation which ought justly to be made by said company to the owner.

(i) Section (8257) provides that after filing of the court's recital order with the Register of Deeds of the County and the payment or deposit by the railroad company of a sum to be paid as compensation and for costs, expenses and counsel fees, the railroad company shall be entitled to enter upon and take possession of the owner's lands and other property, and all persons who have been made parties to the proceedings by publication or otherwise shall be barred of all right, estate and interest in such real estate;

(j) And further provides that within twenty days after the confirmation of the report of the commissioners or jury as above provided for, either party to the proceedings may appeal, by notice in writing to the other to the Supreme Court from the appraisal or report of the jury; that such notice shall specify the objections to the proceedings had in premises and the Supreme Court shall pass on such objections, and on the hearing of such appeal the Supreme Court may direct a new appraisal before the same or new jurors in its discretion, the second report of the jury to be final and conclusive upon all parties in interest.

And that the continuation of the aforesaid proceedings by Defendant, Frank F. Rogers, in the Probate Court of Oakland County under said "Highway Condemnation Act", if permitted, will deprive Plaintiff of all the advantages, immunities, privileges and vested rights that would otherwise be afforded Plaintiff by the foregoing provisions of the "Railway Condemnation Act" had such proceeding been brought under it, and that Plaintiff also would be deprived of the benefits of the common law applicable to the measure of damages in such proceeding.

[fol. 20] XII

That Defendant, Frank F. Rogers, by virtue of his written determination of necessity, made on April 20th, 1928, aforesaid, and by reason of his having caused such writ-

ten determination to be filed in the office of the State Highway Commissioner, and a certified copy thereof recorded in the office of the Register of Deeds of Oakland County, and by reason of his having heretofore deposited with the State Treasurer the aforesaid amounts of money, by the terms of said written determination awarded this Plaintiff, now pretends that the title to, and the right of possession and occupancy of, all the property and property rights described in such determination, previously belong to the Plaintiff, have vested in the State of Michigan; and Plaintiff represents that the said Frank F. Rogers, on behalf of the State of Michigan, has turned over the right of possession and occupancy of said property to Defendant, Detroit, Grand Haven & Milwaukee Railway Company, and the said Railway Company, by virtue of the terms of its construction contract with the Defendant, H. W. Nelson Company, has authorized said Company to occupy said land for the purpose of completing the construction of said railway yards, main line tracks and other railway construction work upon said property, and that Plaintiff has ever since been divested of his right of possession and occupancy of said property.

XIII

That Section 4, of Act No. 340, of the Public Acts of 1927, which declares the changes and improvements contemplated by said Act and the proposed contract, and the taking of the lands described in said contract for the new right-of-way of said Railway Company including the [fol. 21] additional lands described therein necessary for depot and yard purposes at Birmingham, and all other lands necessary to carry out said Act and the proposed contract, to be a public necessity, is in contravention of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the Plaintiff of the Constitutional guaranty of due process of law, and the equal protection of the laws, thereby depriving this Plaintiff of his right to a determination of said question of necessity by a jury in a court of record as provided by the "Railway Condemnation Act," which is the general law applicable in this State, and because it denies the Plaintiff the protection of his day in court and free access to the tribunal

designated by the general laws, and that the provisions of said Section constitute an arbitrary and capricious classification of the Plaintiff and others owning land through which it is proposed to project the right-of-way of said Railway Company.

XIV

That said Railway Company is granted a special immunity from the payment of consequential damages for the diminution of value of the remainder of the tracts from which its right-of-way is taken, and which immunity is not enjoyed by other railroads in the State of Michigan, contrary to the provisions of the 14th Amendment of the Constitution of the United States of America, and for which reason both said Act No. 340, Public Acts of 1927, and Act No. 352, Public Acts of 1925, as amended by Act No. 92, Public Acts of 1927, are void.

XV

Because the proceedings being taken by said Defendants to procure a railway right of way under the provisions of [fol. 22] both of said Acts are a denial to this Plaintiff, as well as to other railroad companies within the State of Michigan, of the equal protection of the laws, in contravention of said 14th Amendment of our Federal Constitution.

XVI

That Plaintiff is informed and believes, and therefore charges the fact to be, that the conduct of the Defendant, Frank F. Rogers, in pursuance of said Act No. 340, Public Acts of 1927, and said Act No. 352, Public Acts of 1925, as amended by Act No. 92, Public Acts of 1927, offend the Constitution of the State of Michigan, for the following reasons:

(a) Because Article 13, Section 1, of the Michigan Constitution provides, that private property shall not be taken by the public, nor by any corporation for public use, without just compensation therefor being first made or secured in such manner as shall be prescribed by law. That just compensation includes consequential damages, and which are not provided for in said Acts.

(b) Because Article 2, Section 16, of our Michigan Constitution provides, that no person shall be deprived of property, without due process of law. That the taking of Plaintiff's property without even making any offer or award of consequential damages for a decrease in the value of the remainder of the tract, contravenes this provision.

(c) Because Article 1, Section 2, of our Michigan Constitution provides that Government is instituted for the equal benefit, security and protection of the People. That said provision is violated for the reason that Plaintiff will be denied the equal protection of the laws, and his property [fol. 23] will be taken without due process of law.

(d) Because Article 2, Section 13, of our Michigan Constitution, provides, that the right of trial by jury shall remain. That the use of said Highway Condemnation Law by the State Highway Commissioner, to acquire a right of way for a railroad company, will deprive Plaintiff of a jury to pass upon his measure of damages, contrary to the provisions of said section.

(e) Because it was not the intention of the framers of our Michigan Constitution, that Article 13, Section 2, would be used for the purpose of authorizing the Legislature of the State of Michigan to pass an act whereby a "Highway Condemnation Law" could be used as a "Railway Condemnation Law," and thereby depriving a land owner, whose property was being taken, of his right to trial by jury, and also of consequential damages as just compensation. For this reason, said Statutes also contravene Article 13, Section 2.

(f) Because Article 5, Section 21, of our Michigan Constitution, provides that no law shall embrace more than one object, which shall be expressed in its title. The title of Act No. 340, Public Acts of 1927, doesn't indicate that said Act authorizes the State to acquire a right of way for the Railway Company, etc., but only that it may enter into an agreement to so acquire. So far as authority to condemn is concerned, the title indicates that the Act only authorizes condemnation for acquiring a seventy foot highway on either side of the relocated tracks. For this reason, the title is too narrow, and offends the Article and Section herein quoted.

[fol. 24] XVII

That the changes and improvements contemplated by said Act No. 340, Public Acts of 1927, and said contract embraced in said Act, and the taking of the lands described in said contract for the new right of way for said Railway Company, including the additional lands described therein, and claimed to be needed for depot and yard purposes at Birmingham, Michigan, and all other lands claimed to be needed or required to carry out said Act and said Contract, are not a public necessity; that the surrender of the railway franchise now owned by Defendant, Detroit, Grand Haven & Milwaukee Railway Company, referred to in said Contract, is not a public necessity; that the taking of 9.10 miles of the right of way now owned and occupied for steam railway purposes by the Defendant, Detroit, Grand Haven & Milwaukee Railway Company, to be utilized to widen the roadbed of said Woodward Avenue is not a public necessity, because sufficient area for that purpose may be obtained by the State of Michigan from the owners of the lands adjacent to and bordering the Westerly line of said Woodward Avenue for less than one-half of what would be the cost of the new proposed right of way sought to be taken by said condemnation proceedings, and that the widening of Woodward Avenue, and the securing of said new right of way for Defendant, Detroit, Grand Haven & Milwaukee Railway Company, is not one project but consists of two or more projects wholly unrelated to each other.

XVIII

That Section 1 of Act No. 340, of the Public Acts of 1927, contains the following provision:

[fol. 25] The Governor of the State of Michigan is hereby authorized and empowered * * * to acquire, or cause to be acquired, by the State Highway Commissioner, a new right of way for said Railway Company approximately nine and one-tenth miles in length, in Oakland County, Michigan.

That Section 10 of said Act contains the said contract entered into by the State and the Railway Company, a copy of which is hereto attached and marked Exhibit "A,"

in which the State agreed to "proceed with all convenient speed to procure, or cause to be procured, a new right of way one hundred feet wide for said Railway Company for the purpose of constructing thereon a new double-track railroad as and where provided in this contract, etc."; that Plaintiff is uncertain as to whether the State of Michigan contends that in the said condemnation proceeding now pending as aforesaid, it is, by virtue of said Act 340, and the said contract therein contained, acting as the agent of said Railway Company, or for the purposes of the instant case, by virtue of said Act, it has withdrawn from the said Railway Company, with its consent, the power to exercise the right of eminent domain, and is itself now exercising that right as though it had never been granted by general statute; that regardless of which construction is put upon the legal import of said Act, the status of the Plaintiff as to his vested rights would be completely changed were he deprived of the protection afforded him by the provisions of the "Railway Condemnation Act," the general law of the State; that Sections 1 and 10 of said Act 340, Public Acts of 1927 are in contravention of the Fourteenth Amendment to the Constitution of the United States, because each [fol. 26] grants to said Railway Company a special immunity from liabilities, not afforded any other railway company under like circumstances and conditions, and deprives Plaintiff of equal immunities, privileges and vested rights afforded all other owners of real estate under like circumstances and conditions when similar proceedings are instituted by other railway companies under the "Railway Condemnation Act," and therefore denies the Plaintiff the equal protection of the laws and deprives Plaintiff of his property without due process of the law.

XX

That because of the invalidity of Sections 1 and 10 of Act 340, of the Public Acts of 1927, or either of them, the whole of said Act has lost its vitality as a Legislative Act, and is unconstitutional, and invalid in its entirety, and that therefore the Probate Court of the County of Oakland is without jurisdiction to grant the prayer of the the said petition of the Defendant, Frank F. Rogers, filed in said court on October 4th, 1928, or to entertain any proceedings thereunder.

XXI

That said Act No. 352, Public Acts of 1925, as amended by Act No. 92, Public Acts of 1927, is being utilized by Defendant, Frank F. Rogers, in said condemnation proceedings on the theory that the acquiring of the present right of way of the Defendant, Railway Company, for highway purposes, and the condemning of Plaintiff's said lands for Railway utility, constitute one project under the provisions of Act No. 340, Public Acts of 1927; that if said theory is the law of the State of Michigan, said Act No. 352, Public [fol. 27] Acts of 1925, as amended by Act No. 92, Public Acts of 1927, contravenes the provisions of the Fourteenth Amendment to the Constitution of the United States, in that it deprives Plaintiff of his property without due process of the law, and denies Plaintiff the equal protection of the laws, and is void.

XXII

And that Defendant, Frank F. Rogers, threatens, and this Plaintiff fears that he will carry his threats into execution, to urge a hearing upon his said petition in said condemnation cause now pending in the Probate Court of the County of Oakland, Calendar No. 23,548, on Wednesday, December 5th, 1928, and impress the Court to grant the prayer of said petition, and by the court's order appoint three court commissioners to proceed to view said premises described in said petition and hear the proofs and allegations of the parties and appraise the damages to be paid as compensation to Plaintiff for the portion of his property taken without making any appraisal and award to Plaintiff for consequential damages to the remainder of his tract, and he, said Frank F. Rogers, threatens to continue the prosecution of said proceedings until the entry of the final order of the court confirming such report of said commissioners, thereby causing this Plaintiff to suffer immediate and irreparable loss and damages in excess of One Hundred Thousand Dollars ($100,000), and that Defendant, Frank F. Rogers, ought to be restrained by the injunction of this Honorable Court from urging a hearing upon his said petition in the Probate Court of the County of Oakland, Michigan, on Wednesday, December 5th, 1928, and at any time thereafter and from impressing

the court to grant the prayer of said petition, and by its [fol. 28] order, appoint three commissioners as therein prayed, and to desist and refrain from prosecuting said condemnation proceedings before said court or its commissioners until the further order of this court, and that upon the hearing of this cause said injunction be made permanent.

Inasmuch, therefore, as Plaintiff is without relief, except in a court of equity, he prays:

That the said Detroit, Grand Haven & Milwaukee Railway Company, a Michigan Corporation, H. W. Nelson Company, a foreign corporation, and Frank F. Rogers, State Highway Commissioner for the State of Michigan, be made Defendants herein, and be required to answer the allegations of this Bill of Complaint, paragraph by paragraph, but not under oath, their answers under oath being hereby waived, and that process issue accordingly.

That the said Detroit, Grand Haven & Milwaukee Railway Company, a Michigan Corporation, H. W. Nelson Company, a foreign corporation, Frank F. Rogers, State Highway Commissioner for the State of Michigan, their agents, attorneys, counsellors, servants and employes and, each of them, be restrained by the order of this Court from proceeding with the construction of a right of way across and over the property of this Plaintiff, and from doing any work of any kind, nature or description in connection therewith, and that they be directed by the decree of this Court forthwith to remove from the property owned by this Plaintiff all tools, appliances and apparatus used for the construction of said right of way and said railway system.

That pending the hearing of this cause a temporary injunction may be issued out of, and under the seal of, this [fol. 29] Honorable Court, directed to the said Frank F. Rogers, State Highway Commissioner, restraining him from urging a hearing upon his said petition in the Probate Court of the County of Oakland, Michigan, on Wednesday, December 5th, 1928, and at any other time thereafter, and from impressing the court to grant the prayer of said petition and by its order appoint three commissioners as therein prayed, and to desist and refrain from prosecuting

said condemnation proceedings before said court, or its commissioners, until the further order of this Court.

That pending the hearing of this cause a temporary injunction may be issued out of and under the seal of this Court, directed to the said Defendant, Detroit, Grand Haven & Milwaukee Railway Company, a Michigan Corporation, and to the Defendant, H. W. Nelson Company, a foreign corporation, and to Defendant, Frank F. Rogers, State Highway Commissioner for the State of Michigan, restraining them and each of them from proceeding with the construction of said railway right of way, and a steam railroad and railroad yards thereon or any appurtenances thereto, and that upon the hearing of this cause said injunction be made permanent.

That Plaintiff may have such other, further and additional relief in the premises as shall be agreeable to equity and good conscience, and to this Court shall seem meet.

(Sgd.) Frank H. Dohany. Dohany & Dohany, Attorneys for Plaintiff, 1021-1025 Hammond Bldg., Detroit, Michigan.

[fol. 30] *Duly sworn to by Frank H. Dohany. Jurat omitted in printing.*

EXHIBIT "A" TO BILL OF COMPLAINT

This contract and agreement, made and entered into by and between the Detroit, Grand Haven and Milwaukee Railway Company, party of the first part, hereinafter called the "Railway Company," and the State of Michigan, party of the second part, hereinafter referred to as the "State," witnesseth, as follows:

Whereas the Detroit, Grand Haven & Milwaukee Railway Company is a corpoartion organized and existing under and by virtue of a special charter granted by the territorial council of the territory of Michigan, March seven, eighteen hundred thirty-four, and acts amendatory thereof and supplementary thereto, under which said statutory special charter said railway company pays annually a fixed [fol. 31] percentage of its capital stock paid in as taxes to the state, and at the present time is paying annually

twenty-five thousand one hundred seventy-one dollars and forty cents ($25,171.40); and

Whereas the validity of said special charter of said railway company has been attacked from time to time by the state, in the courts of this state, and the validity of said special charter has been upheld by the Supreme Court of this state, and the Supreme Court of the United States; and

Whereas the State of Michigan has for many years sought to procure the surrender of all of the special charters of all of the railroad companies in the State of Michgan, and to have said railroad companies incorporate under the general laws of the State of Michigan providing for the organization and incorporation of railroad companies and to pay the same rate of taxes to the state upon the true cash value of their taxable property, but that the said railway company has refused to surrender its special charter and to incorporate under the general railroad law, and to pay taxes upon the value of its taxable property in accordance with the general law of said state providing for the taxation of the property of railroad companies; and

Whereas the State is desirous of acquiring the right of way of said railway company extending from the railway company's mile post number thirteen in Royal Oak to the railway company's mile post number twenty-two and one-tenth between Pontiac and Birmingham, for the purpose of enabling the state to carry out its highway program, and to widen to two hundred feet the right of way of the public highway running substantially parallel to said right of way of said railway company, and known as Woodward [fol. 32] Avenue, and to have said railway company remove its tracks and equipment from said right of way; and

Whereas said railway company executed in its own behalf by its president, attested by its secretary, a contract, which said contract was submitted to the legislature of the State of Michigan for its ratification and approval, at the extra session of the legislature conveyed in nineteen hundred twenty-six; and

Whereas the legislature of the state, by act number one, of the public acts of the extra session of nineteen hundred twenty-six, approved in all respects said contract, and authorized the governor and the state highway commissioner

to execute the same upon the part of the State of Michigan, attested by the Secretary of State; and

Whereas after said contract was so executed on behalf of the said railway company and submitted to the legislature of the state and approved by it, and the governor and the state highway commissioner were authorized to execute the same on behalf of said state, to be attested by the secretary of state, said contract was materially changed from the terms of the contract executed by said railway company and submitted to the legislature of the state; and

Whereas the plans and specifications attached to the contract executed on behalf of said railway company and on behalf of the state on September two, nineteen hundred twenty-six, were altered and amended subsequent to the passage by the legislature of the state and the approval by the governor, of act number one, of the public acts of the extra session of nineteen hundred twenty-six, and that by reason of the changes made in material parts of said contract after the approval of the same by the legislature [fol. 33] by act number one of the public acts of the extra session of nineteen hundred twenty-six, said contract is claimed by the State of Michigan to be of doubtful validity, although the railway company does not admit any such invalidity, said amendments, additions and alterations made in and to said contract not having been ratified by the legislature of the state, and both parties to said contract desiring to obviate, as far as possible, any question of the validity of the same which might or could be raised on account of such modifications subsequent to its ratification and approval by the legislature of the state; and

Whereas said railway company and the state have entered into negotiations which have resulted in the making of a new contract and agreement and the setting aside and cancellation of the contract and agreement made and entered into on September two, nineteen hundred twenty-six, and on file in the office of the secretary of state of the State of Michigan, subject to the ratification and approval of the same by the legislature of the State of Michigan and by the board of directors of said railway company;

Now, therefore, it is hereby agreed by and between the said railway company, party of the first part, and the State of Michigan, party of the second part, as follows:

1

That the contract and agreement heretofore made and entered into under date of September two, nineteen hundred twenty-six, and filed in the office of the secretary of state of the State of Michigan on the third day of September, nineteen hundred twenty-six, whether valid or invalid, be and the same is hereby cancelled, set aside and held for naught, on the approval of this contract by the legislature [fol. 34] and its execution as herein contemplated.

2

That the State of Michigan shall, upon the ratification, approval and execution of this contract by the parties thereto, as required by law, proceed with all convenient speed to procure or cause to be procured a new right of way one hundred feet wide for said railway company for the purpose of constructing thereon a new double track railroad, as and where provided in this contract, and the state shall, in the first instance, advance the money to defray the expense of procuring the same.

3

Immediately after the ratification, approval and execution of this contract by the respective parties thereto as herein provided, said railway company shall, upon the new right of way being procured by the state, at once take charge of and construct with all convenient speed upon said new right of way so to be procured, a single track railroad, together with the necessary grade separations and approaches, sidetracks, switches, incidents and appurtenances, in accordance with the plans and specifications annexed to the contract made and entered into September two, nineteen hundred twenty-six, between the parties hereto and filed in the office of the secretary of state of the State of Michigan on September three, nineteen hundred twenty-six, which plans, specifications and blueprints are made a part hereof,

except as herein modified or as they shall hereafter be modified as provided herein.

[fol. 35]

4

That said railway company, upon the completion of its railroad upon said new right of way, shall remove its railroad tracks and equipment from the old right of way now occupied by it between the points herein designated, and the state, upon the removal of said tracks and equipment of said railway company by said railway company from said right of way, may at once take possession of the same and use and improve the same, including the railway company's present right of way through Birmingham, for highway purposes, and said railway company agrees to make, execute and deliver to the state all such deeds, releases and conveyances as shall or may be deemed necessary, requisite and proper to convey the same to the state, but there shall not be conveyed to the state, by the railway company any lands between said points other than its old right of way, and such parts of other lands owned by said railway company as shall be necessary to be acquired by the state to widen said Woodward Avenue to a width of two hundred (200) feet.

5

Upon the carrying out of this contract, and the removal of said railway tracks by said railway company from the old right of way to the new right of way, or the building of new tracks on said new right of way by the railway company, and the payment to the State of Michigan by said railway company in full for the cost and expense incurred by the state under this contract, said railway company shall forthwith surrender its special charter and any and all rights which it now has or claims to have thereunder, and incorporate under the general laws of the state providing [fol. 36] for the incorporation of railroad companies, and transfer any and all assets of said railway company as it exists under said special charter, together with all additions to and replacements of its property, to said railway company to be incorporated under the general laws of the state providing for the incorporation of railroad companies. That said railway company shall, upon the surrender of its

special charter as above set forth, thereafter be assessed for taxes in the State of Michigan, without discrimination, under the general tax laws in force in said state, from time to time, providing for the taxation of the property of railroad companies.

6

The deed or deeds of conveyance from the persons owning the lands to be acquired by the state for the new right of way of said railway company, shall be taken in the name of the State of Michigan, and when the state shall have acquired the title to all of said right of way and said railway company shall have completed the work to be by it done under this contract, the same shall be conveyed by the state to said railway company, and the governor of the State of Michigan is hereby authorized and empowered to make, execute and deliver said deed or deeds of conveyance on behalf of the state, the same to be attested by the secretary of state of the State of Michigan, and acknowledged by them and each of them under the great seal of the state.

7

The railroad company shall repay to the State of Michigan all money advanced by the state, or the state highway commissioner, in acquiring the right of way for said rail- [fol. 37] road company and in paying said railroad company, in the first instance, for doing and performing the work and in furnishing the materials contracted by it to be performed and furnished at the times and in the amounts and in the manner following: On the thirty-first day of December, in the year that the state shall have acquired control of the new right of way herein provided to be procured, the railroad company shall pay to the state the sum of two hundred fifty thousand dollars, and on each succeeding thirty-first day of December thereafter the further sum of two hunderd fifty thousand dollars: Provided, however, That when the actual cost of carrying out said contract in its entirety shall have been ascertained, then the railroad company shall pay to the state a sum equal to one fifteenth of said total actual cost, plus or minus the amount of over-payment or under-payment that shall have been made by said railroad company: And provided further,

That said railroad company shall repay to the state all the money paid, laid out and expended under the terms and provisions of said agreement within fifteen years after the first payment by it made, as herein provided. It is expressly understood and agreed that no interest charge shall be made or accepted by the state on account thereof, except on past due installments, if any, and then at the rate of five per cent per annum.

8

The state, acting through its state highway commissioner and with the assistance of the railway company, agrees, at its entire initial expense, but to be fully repaid as hereinafter provided, to acquire by purchase, condemnation or otherwise a one hundred foot right of way, hereinafter referred to as the new right of way, together with such ad- [fol. 38] ditional width as and where necessary to provide for proper cuts, fills and drainage for the proper development of said one hundred foot right of way for railroad purposes, between the aforesaid points, on the route designated on the blueprints, dated October four, nineteen hundred twenty-six, identified by the signature of the state highway commissioner and the chief engineer of the railway company, which are on file with the parties hereto and which are hereby made a part hereof, it being understood that the portion of the old right of way at or near said mile post thirteen, which lies within the new right of way, shall continue as part of the latter, and that the portion of the old right of way from said mile post twenty-two and one-tenth to mile post twenty-one and thirty-five one-hundredths which lies within the new right of way, shall continue as part of the latter; also to likewise acquire the necessary additional land for station grounds at Birmingham, on the altered and relocated route, including that necessary for depot, freight house, team track, passing tracks, and other usual and necessary appurtenances, such additional land to be four thousand feet in length and approximately three hundred feet in width, including said one hundred foot right of way, as indicated on said blueprints.

(a) It is understood and agreed that the acquisition of said new right of way and other lands shall be promptly commenced, prosecuted and completed, and that such ac-

quisition shall be under the joint supervision of the state highway commissioner and the said railway company's chief engineer; they shall jointly appoint competent agent or agents to conduct the negotiations for such right of way and other lands, and shall have full authority to fix the compensation of such agent or agents, and to discharge them [fol. 39] at any time. No purchases shall be made except on the joint approval, in writing, of said state highway commissioner and chief engineer, and should either disapprove of the price of any proposed purchase, then the same shall not be concluded, but the land therein involved shall be acquired by condemnation. When condemnation is necessary, proceedings therefor shall be instituted and conducted in behalf of the state, by its proper officers, but with the right in the railway company, through its attorney or attorneys, and other representatives, to participate in such proceedings. All expenses involved in such acquisition, including detailed surveys and map work, therefor, shall be considered and treated as a part of the cost thereof, except that there shall not be included in such expenses any allowance for the services of the said state highway commissioner or chief engineer, or the attorneys for the parties.

(b) If the state highway commissioner, in the purchase of said new right of way and other lands, finds it expedient or necessary to purchase more land, adjacent to any part thereof, than may be actually required, it is understood and agreed that he may do so, provided such purchase shall be approved, in writing, by the said railway company's chief engineer, and that the cost of such additional land shall be considered and treated as a part of the cost hereunder, and that the surplus land, either the whole or any part thereof, shall be disposed of on the best terms obtainable, at such time or times as the state highway commissioner and said chief engineer may deem expedient, if such disposition is prior to the making and delivery of the exchange deeds herein provided for, the state highway commissioner and said chief engineer to approve, in writing, [fol. 40] each and every proposed disposition thereof, and the net proceeds thereof shall be credited to the cost hereunder. If such disposition of any part of such surplus lands has not been made prior to such exchange deeds, then any

remaining portion thereof shall be included in the deed to the railway company, and it shall thereafter be the sole owner thereof.

(c) Evidences of good, merchantable title to said new right of way, and other land, in the form of abstracts or otherwise, shall, from time to time, as said right of way and other land is acquired, be furnished by the state highway commissioner to the railway company, and the cost and expense thereof shall be deemed a part of the cost of said right of way.

9

The railway company agrees, at the entire initial expense of the state, but to be fully repaid, as hereinafter provided, to itself do, or cause to be done by letting on contract to a contractor or contractors, all the work, including the furnishing of all materials for the grading of said new right of way, for a double track railroad, including all necessary drainage structures; also including the separating of the grades and crossing protection at the railroad crossings specified in general plans herein mentioned; also including the construction on said new right of way of a single track railroad, with necessary appurtenances, including construction on new right of way of telegraph pole lines and wires and other telegraph facilities of like kind as those now existing on old right of way; and also including facilities on new station grounds at Birmingham of like kind as those now [fol. 41] existing on old station grounds, all on the grade and according to the general plans and specifications annexed to the contract dated September second, nineteen hundred twenty-six, and filed in the office of the secretary of state, September third, nineteen hundred twenty-six; detailed plans and specifications to be prepared by the railway company as the work progresses, the expense thereof to be considered and treated as part of the cost of the work hereunder, all to be of the standard of first class for a modern railroad, not less than required by law; said work to be commenced and prosecuted with reasonable diligence after the new right of way has been acquired; Provided, That the railway company, at its option, may, before said new right of way has been fully acquired, com-

mence and prosecute such work in any section where sufficient of the new right of way has been acquired to permit of expeditious and economical work.

(a) It is understood and agreed that the state highway commissioner, with the assistance of the railway company, shall procure any and all necessary public approval for the work to be done hereunder; and that the railway company, with the assistance of the state, shall procure any and all necessary approval from the interstate commerce commission for the abandonment of its old rights of way and relocation on its new right of way; and that any damages and/or expenses arising out of the carrying out of this contract shall be considered and treated as a part of the cost thereof.

(b) When the single track with appurtenances has been constructed as aforesaid, the railway company shall physically connect the same with its railroad at said mile posts thirteen and twenty-two and one-tenth, the expense thereof to be considered and treated as part of the cost of the work [fol. 42] hereunder.

(c) It is understood that it shall be optional with the railway company to itself perform any or all of the work hereby provided for, or to let the same on contract to a contractor or contractors. As to work which the railway company elects to let to a contractor, it shall procure proper bids of contractors, and will award the work to contractor or contractors at prices which shall first have been approved, in writing, by the state highway commissioner, and will make the necessary contract or contracts with the contractor or contractors, and pay for the work and materials by monthly estimates.

(d) It is understood and agreed that the railway company shall appoint a competent engineer to have general charge and supervision of the work herein provided for, both that performed by the railway company itself, and that performed by contractors, subject to the provisions hereof, and that he shall have authority to employ necessary assistants, including inspectors, and that the expense of such engineer, assistants and inspectors, including salaries or wages, field office, supplies, or any other items

necessarily incident to said work, shall be considered and treated as a part of the cost of the work.

(e) It is understood and agreed that, as to work performed by the railway company itself, there shall be added to the cost of all materials furnished by it from stock to accomplish such work, fifteen per cent to cover the expenses of handling in transit, freight charges accruing on materials (the shipment of which originates on lines of railway companies comprising the Grand Trunk railway system), accounting, and other like overhead expenses which it is [fol. 43] impracticable to allocate; it being understood that all other materials shipped for use in such work are to be pruchased f. o. b. Royal Oak or Birmingham, for delivery at such place there as many be designated by the railway company, and said fifteen per cent shall not apply to any material so purchased.

(f) To the cost of all labor, performed by the railway company itself, including foremen, there shall be added ten per cent to cover the cost of accounting, use of small tools, and other like overhead expenses, which it is impracticable to allocate.

(g) It is further understood and agreed that, as to work performed by contractors for the railway company and as to materials purchased f. o. b. Royal Oak or Birmingham, as aforesaid, there shall be added to the cost thereof, as fixed by contract, one per cent to cover the cost of advertising for bids, letting contracts, accounting, and other like overhead expenses which it is impracticable to allocate.

(h) It is further understood that the railway company will be required to furnish certain equipment for use in such work, and it is agreed that for equipment owned or controlled by it, or by companies comprising the Grand Trunk railway system, rental may be charged, and included in the cost of the work, such rental to be reasonable and according to the prevailing charges for like or similar purposes, and also other expenses contracted therewith, as well as the actual rental and other expenses paid for equipment leased from outside parties.

(i) The railway company shall monthly render to the state highway commissioner, acting for the state, bills covering the cost to it for the preceding month, including all expenditures made hereunder, which are chargeable to [fol. 44] the cost of the work, whether for work by itself performed, or for work performed by contractors for it, according to estimates to be made by the railway company's chief engineer, the state highway commissioner or his representatives to have access to all the railway company's records pertaining to such work for the purpose of checking the same, and the state agrees to pay such monthly bills within thirty days from the date of rendition; if not paid within thirty days after rendition, said bill or bills shall bear interest at the rate of five per cent per annum until paid; and said bills, together with accrued interest thereon, shall be deductible from the next succeeding annual payment or payments under paragraph seven hereof if not paid by the state before such payments become due; such accrued interest, if any, thus deducted shall not be considered and treated as a part of the cost of the work to be repaid by the railway company under said paragraph seven.

(j) When the construction aforesaid, including the furnishing of the materials, and also including the physical connection of said new single track with the railway company's railroad at mile posts thirteen and twenty-two and one-tenth, as aforesaid, is completed, the railway company shall promptly remove the physical materials, such as rails, ties, etc., from the old right of way, and the fair, net value thereof, with proper allowance for depreciation and expense of removal, as specified in the schedule annexed to the contract dated September second, nineteen hundred twenty-six, and filed in the office of the secretary of state, September third, nin-te-n rundr-d tw-nty-six, shall then be credited to, and deducted from, the total cost incurred by the state hereunder.

[fol. 45] 10

This contract shall inure to and be binding upon the respective successors and assigns of the parties hereto, and in event said railway company consolidated with, leases or sells its railroad and other property to any other railroad

company, whether of the Grand Trunk railway system, or otherwise, the rights, duties and obligations of the parties hereunder shall run with such railroad and other property without loss or waiver thereby of any of the same, and the consolidated, purchasing or lessee railway company shall hold the same with all rights and obligations pertaining thereto hereunder, including the obligation and the right to make the payments herein specified without further responsibility for taxes in addition to the annual sum of twenty-five thousand one hundred seventy-one dollars and forty cents ($25,171.40) until the time shall have expired for the making of such payments in full to the state by said railway company, as herein specified; said railway company is not to obtain, however, an extension of the time herein specified, at which it is to come under the general railroad laws of the state for the purposes of taxation, nor be longer exempted from taxation under the general laws of the state providing for the taxation of railroad companies, by reason of any default in performance, or failure to pay, as herein provided, upon its part.

11

Should any dispute arise between the parties hereto involving any matters herein it shall be submitted to a committee composed of the governor of the State of Michigan, the president of said railway company, and a third person, [fol. 46] to be selected by them. In the event that the governor of the State of Michigan and the president of the Detroit, Grand Haven and Milwaukee Railway Company shall be unable to agree upon a third arbitrator, the then senior judge of the United States District Court, for the eastern district of Michigan; shall select such third arbitrator upon the written application of either party. Said committee shall fix a time and place of hearing, giving reasonable notice to the parties, who shall have the right to introduce such evidence and arguments as may be deemed proper, and the decision of a majority of said committee shall be final and conclusive as to the matter submitted to them. The expense of such arbitration shall be borne by the parties hereto equally, provided such committee may, in its discretion, otherwise apportion such expense.

If at any time after the execution, ratification and approval of this contract it shall be deemed necessary and advisable by the state to make additional grade separations along the line of said new right of way, in addition to the grade separations provided for in the plans and specifications herein referred to and made a part of this contract, said additional grade separations shall be made and the expense thereof be paid, as provided by the general laws of the State of Michigan governing the separation of grades at railroad crossings.

13

The state reserves the right to change or relocate the new right of way herein specified, with the consent of the chief engineer of said railway company, but in case of such change of location of new right of way, the grade thereof shall conform substantially to the grade herein referred to [fol. 47] and provided for, and the cost of securing said right of way and of paying for the same, shall be ascertained, fixed and paid as herein provided, but nothing herein contained, if it may change the total amount to be paid, laid out and expended by the state, shall change, modify or extend the time within which said railway company shall pay and reimburse the state in full for any and all moneys paid, laid out and expended by it in carrying out and performing the terms and conditions of this contract, incumbent on its part to be carried out and performed by it.

14

This contract and agreement shall not be binding until it shall have been ratified and approved by the legislature of the State of Michigan, signed on behalf of said state by the governor, attested by the secretary of state, under the great seal of the state, and signed by the state highway commissioner, and until the same shall have been executed on behalf of said railway company by its proper officers.

15

The state, on the carrying out and fulfilling of this contract by the parties hereto, expressly abandons and fully

relinquishes any right it has, or now claims to have, to purchase or otherwise acquire the railroad and/or other property of the railroad company, under the special charter or otherwise.

In witness whereof the parties hereto have caused this contract to be executed in quadruplicate, in their corporate [fol. 48] names, by their respective duly authorized officials, this — day of ——, A. D. 1927.

State of Michigan, by —— ——, Governor. Attest. —— ——, Secretary of State. —— ——, State Highway Commissioner. Detroit, Grand Haven and Milwaukee Railway Company, by —— ——, President. Attest: —— ——, Secretary.

This act is declared to be immediately necessary for the public health, peace and safety.

This act is ordered to take immediate effect.

Approved June 1, 1927.

[fol. 49] EXHIBIT "B" TO BILL OF COMPLAINT

STATE OF MICHIGAN:

IN THE PROBATE COURT FOR THE COUNTY OF OAKLAND

23548

Petition of FRANK F. ROGERS for the Appointment of Commissioners, Wilbur M. Bruckner, Attorney General; Kit F. Clardy, Assistant Attorney General

To the Probate Court for the County of Oakland:

Your petitioner, Frank F. Rogers, State Highway Commissioner of the State of Michigan, respectfully represents to the court:

1. That he is the duly elected and qualified highway commissioner in and for the State of Michigan.

2. That the highway known as U. S. Road No. 10, also known as Woodward Avenue, a portion of which lies within

the County of Oakland, State of Michigan, is under the direction, supervision and control of your petitioner as State Highway Commissioner, pursuant to the statute in such case made and provided.

3. That it has become and now is necessary to improve said road by constructing the necessary grade and drainage structures and surfacing said road and to remove from their present location the tracks of the Detroit, Grand Haven and Milwaukee Railway Company along a certain portion of the said road as detailed and set forth in the plans and specifications now on file in the offices of the State Highway Department and the Secretary of State and known as State Highway Project No. M-063-3, being [fol. 50] the project authorized and declared necessary by Act 340 of the Public Acts of 1927 of the State of Michigan, and more particularly described in a certain contract dated July 20, 1927, between the State of Michigan and the Detroit, Grand Haven and Milwaukee Railway Company on file in the office of the Secretary of State at Lansing, Michigan.

4. That by virtue of the premises it becomes and now is necessary to take the fees simple title for the public highway purposes, set forth and described in Act 340 of the Public Acts of 1927, of certain property for the purchase of which your petitioner has been unable to agree with the owners.

5. That on the 19th day of April, A. D. 1928, your petitioner, acting under and by virtue of the provisions of Act 352, Public Acts of 1925, as amended by Act 92, Public Acts of 1927 of the State of Michigan, made and filed in his office a written determination of the necessity of said Public Highway improvement project, the necessity for taking the fee simple title for Public Highway purposes aforesaid of property therein fully described as follows:

(Here follows 20 pages of legal description), including part of (5¼ acres) N. ½ of S. E. ¼ of N. E. ¼ of Sec. 3 K., Town 2 N., R. 11 E., Oakland County, Mich.

F. H. Dohany—Damage $1,137.50.

Including also 7.250 acres in the West ½ of the N. E. ¼ of Section 31, T. 2 N., R. 11 E., Oakland County, Mich.

F. H. Dohany—Damage $23,562.50. (Total of $24,-700.00).

[fol. 51] 5 (cont'd). And of the damages which in his opinion should be paid to the owners and persons interested in said described property, as compensation for the taking of such fee simple title, for said public highway improvement of said described property; and that on the 23rd day of April, A. D. 1928, your petitioner caused said written determination so made by him as aforesaid and dated the 19th day of April, A. D. 1928, to be recorded in the office of the register of deeds for Oakland County in liber 18 of miscellaneous records on pages 1 to 48, inclusive.

6. Your petitioner further shows unto the court that prior to the making of the determination described in paragraph 5 of this petition, and on to wit: the 14th day of April, A. D. 1928, he caused a hearing to be held for the purpose of determining the necessity for the construction, improvement and completion of the state trunk line road known as U. S. No. 10, also known as Woodward Avenue, from the county line between Wayne and Oakland Counties, Michigan, to the City of Pontiac, Michigan, in accordance with the plans and specifications now on file in the office of the State Highway Department and the Secretary of State and known as State Highway Project No. M-063-3, being the project authorized and declared necessary by Act 340 of the Public Acts of 1927 of the State of Michigan, and more particularly described in a certain contract dated July 20, 1927, between the State of Michigan and the Detroit, Grand Haven and Milwaukee Railway Company, now on file in the office of the Secretary of State at Lansing, Michigan, after due notice of the time and place of said hearing had been given to the several parties in interest so far as known, at least seven days before said hearing in order that said interested parties might appear and have an op-[fol. 52] portunity to defend, in accordance with the statute in such case made and provided and that said determination was not made until all parties interested, so far as known, had been given an opportunity to be heard in the premises.

7. Your petitioner further shows that since the making and filing of said written determination as aforesaid, the

amount therein named to be paid as compensation, for the taking fee simple title of said property for such public highway improvement was tendered to the persons entitled thereto, so far as known, who resided in the County of Oakland, that said tender was refused and that your petitioner thereupon deposited said sum of money with the State Treasurer of the State of Michigan to be paid to the person or persons entitled thereto upon execution and delivery of a proper release or conveyance of a fee simple title of the said described property, or subject to the order of the court in case of an award of damages by court commissioners, proof of said tender and deposit being now on file in your petitioners office in the City of Lansing, Michigan.

8. That upon the filing and recording of said written determination and proof of the tender and deposit as aforesaid, your petitioner gave notice thereof to the person or persons interested in said above described parcels of land, so far as known, said notice stating that your petitioner was about to take possession of said described land for public highway purposes as therein stated, proof of service of such notice being on file in your petitioner's office in Lansing, Michigan.

9. Your petitioner says that he has never been able to agree with the person or persons interested in said described property as owners or otherwise on the damages [fol. 53] to be paid as compensation for the taking of a fee simple title of the same for such public highway purposes and that your petitioner has taken or is about to take possession of said described land for the public highway purposes stated in said written determination.

10. That the description of the parcels of property, the names of the persons interested therein as owners or otherwise, so far as known, and the damages which in the opinion of your petitioner should be paid as compensation for such taking is fully set forth in paragraph 5 in this petition.

Whereupon your petitioner prays:

(a) That an order be made by this Honorable Court fixing a day for hearing on said petition which shall not be less than 15 days after the making of said order.

(b) That a copy of this order be published twice within 15 days prior to said date of hearing in the Birmingham Eccentric, a newspaper published and circulated in the County of Oakland.

(c) That on the day set for hearing as aforesaid the court shall enter the default of all persons interested in said described property or any of them who have not appeared and shall direct the payment to such persons of the sum or sums of money stated in the written determination hereinbefore mentioned as compensation for taking the parcel of land described in which such person or persons are interested.

(d) That on the day fixed for hearing as aforesaid if any person interested in the above described property has [fol. 54] appeared, the court shall, unless sufficient cause to the contrary be shown, appoint three disinterested persons as court commissioners to appraise the damages to be paid as compensation for the taking of a fee simple title in, over and upon the above described land for public highway purposes as set forth in said written determination above mentioned.

(e) That at the time of appointing such court commissioner- the court shall fix a time and place for the first meeting of the said court commissioners and shall authorize the said court commissioners to adjourn their meeting from time to time not later than a day to be named and that a time be fixed by this court for the filing of the report if in writing of said court commissioners.

(f) That the court shall make such other or further orders relative to the premises as may be just and proper, and your petitioner will ever pray, etc.

Frank F. Rogers, State Highway Commissioner for the State of Michigan. Wilbur M. Bruckner, Attorney General; Kit F. Clardy, Ass't Attorney General, Attorneys for Petitioner, Lansing Michigan.

[fol. 55] STATE OF MICHIGAN:

IN THE PROBATE COURT FOR THE COUNTY OF OAKLAND

In the Matter of the Petition of FRANK F. ROGERS, State Highway Commissioner for the State of Michigan, for the Condemnation of Certain Lands in Oakland County, Michigan

At a session of said Court held in the Probate Court at the Court House in the City of Pontiac, Oakland County, Michigan, on the 4th day of October, A. D. 1928.

Present: Honorable Dan A. McGaffey, Judge of Probate.

It appearing to the Court that Frank F. Rogers, State Highway Commissioner of the State of Michigan, has this day filed in said Court a petition setting forth that it has become and now is necessary to improve said road by constructing the necessary grade and drainage structures and surfacing said road and to remove from their present location the tracks of the Detroit, Grand Haven and Milwaukee Railway Company along a certain portion of the said road as detailed and set forth in the plans and specifications now on file in the offices of the State Highway Department and the Secretary of State and known as State Highway Project No. M-063-3, being the project authorized and declared necessary by Act No. 340 of the Public Acts of 1927 of the State of Michigan, and more particularly described in a certain contract dated July 20, 1927, between the State of Michigan and the Detroit, Grand Haven and Milwaukee Railway Company on file in the office of [fol. 56] the Secretary of State at Lansing, Michigan, and and that by virtue of the premises it becomes and now is necessary to take the fee simple title for the public highway purposes, set forth and described in Act 340 of the Public Acts of 1927, of certain private property for the purchase of which said petitioner has been unable to agree with the owners, and praying among other things, that the Court appoint three disinterested persons as Court Commissioners to appraise the damage to be paid as compensation for the taking of the fee simple title of the land hereinafter described for public highway purposes, the names of the persons mentioned in the petition and the

description of each piece or parcel of property being as follows:

Property of Frank H. Dohany

No. 1. All that part of that parcel of land described as follows:

Beginning at a point on the East and West ¼ line of said Section 31, which is distant Westerly 769.18 feet from the East line of said Section 31; thence extending Westerly along said East and West ¼ line a distance of 347.52 feet to a point which is distant Easterly 201.5 feet from the Easterly North and South ⅛ line of said Section; thence Northwesterly on a line which makes a Northwesterly angle of 59 degrees 46 minutes with the said East and West ¼ line a distance of 360.4 feet to the beginning of a curve; thence continuing Northwesterly on a curve to the left having a radius of 22,661.83 feet through a central angle of 0 degrees 7 minutes, a distance of 46.4 feet to a point on the Easterly North and South ⅛ line which point is distanct Northerly 351.2 feet from the East and West ¼ line of said Section; thence Northerly along [fol. 57] the said Easterly North and South ⅛ line a distance of 595.6 feet to a point, which point is Northerly 151.8 feet from the N. E. corner of the Sheffield Estates No. 1 sub-division; thenee Southeasterly on a curve to the right having a radius of 22,961.83 feet through a central angle of one degree twenty-four minutes, twenty-one seconds, a distance of 563.2 feet to a point of tangency; thence continuing Southeasterly on a tangent to the curve at said point a distance of 535.35 feet to a point of beginning; containing an area of 5.184 acres more or less, which lies within the North ½ of the Southeast ¼ of the Northeast ¼ of Section 31, Town 2 North, Range 11 East, Oakland County, Michigan, containing about .35 acres.

Owner: Frank H. Dohany.

Property of Frank Dohany

A parcel of land in the West ½ of the N. E. ¼ of Section 31, T. 2 N., R. 11 E., Oakland County, Michigan, more particularly described as follows:

Beginning at a point on the West line of lands owned by Frank Dohany (which is also the East line of the Birmingham Gardens Subdivision) said point being distant Southerly 815.3 feet from the North line of said Section 31; thence in a Southeasterly direction on a curve to the right having a radius of 22,961.83 feet through a central angle of 3° 3′ a distance of 1220.4 feet to a point on the Easterly North and South ⅛ line of said Section 31, which point is distant Northerly 151.8 feet from the S. E. corner of said Frank Dohany property, which is also the N. E. corner of the Sheffield Estates Subdivision No. 1; thence Southerly along the said Easterly North and South ⅛ line a distance of 151.8 feet to the said S. E. corner; thence Westerly along [fol. 58] the South line of said Frank Dohany's property making a Northwesterly angle of 90° 04′ with said last described course a distance of 260.42 feet to a point; thence in a Northwesterly direction on a curve to the left having a radius of 22,661.83 feet through a central angle of 1° 54′ 20″ a distance of 753.26 feet to a point on the West line of said Frank Dohany's property, which point is distant Southerly 1358.3 feet from the North line of said Section 31; thence Northerly along the West line of said Frank Dohany's property a distance of 543.0 feet to the point of beginning; containing an area of 7.250 acres more or less.

Owner: Frank H. Dohany.

It further appearing to the Court by affidavit on file in said cause, that Joseph E. Lewis, George W. Slaughter, Frank H. Dohany, William Dohany, Charles E. Dohany, John Dohany, Emmet Dohany, Sergius P. Grace, Jeanette Grace, Elmer P. Webb, Paul E. Grosse, Lilla Arndt, Arno Arndt, Mrs. Mannie Drennen, Leo E. Trend, Jr., Ann Palmer, Robert Rose, Iva Rose, Donald R. Galvin, Edgar M. Fitzsimmons, Fitzsimmons and Galvin, Incorporated, Marentette Realty Company, Securities Land Development Company and the Union Trust Company, reside out of the County of Oakland.

Therefore, it is ordered that on Wednesday, the 5th day of December, A. D. 1928, at 10 o'clock in the forenoon at the Probate Court at the Court House in the City of Pontiac, Oakland County, Michigan, be and is hereby fixed as the time and place for the hearing on said petition at which

time and place all persons interested in the property herein described shall be given an opportunity to show cause why [fol. 59] the prayer of said petitioner shall not be granted.

It is further ordered that a copy of this order shall be published in The Birmingham Eccentric, a newspaper published and circulated in the County of Oakland, Michigan, at least twice within fifteen days prior to the day and date of hearing and that a copy of such order shall be mailed to each absent or non-resident of the County of Oakland at his last known post office address, by registered mail and return receipt demanded in any case in which a copy of such order has not been served on each said absentor non-resident person.

(Sgd.) Dan A. McGaffey, Judge of Probate.

A true copy. Ruth Immick, Register of Probate.

Wilbur M. Bruckner, Attorney General; K. F. Clardy, Asst. Attorney General. Business address: Capitol, Lansing, Mich.

[fol. 60] IN UNITED STATES DISTRICT COURT

[Title omitted]

RESTRAINING ORDER AND ORDER TO SHOW CAUSE—Dec. 4, 1928

Whereas in the above cause a motion for the issuance of a preliminary writ of injunction has been duly filed, and the hearing being fixed for 9 o'clock A. M. on the 17th day of December, 1928, in the City of Detroit, Michigan, in the Post Offie Building, District Court Room; and it having been made to appear that there is immediate danger of irreparable injury being caused to plaintiff, before the hearing of said application for the writ of injunction, unless the said defendants are, pending such hearing, restrained as herein set forth;

Now, therefore, take notice that you, Frank F. Rogers, State Highway Commissioner for the State of Michigan, defendant herein, your agents, servants, deputies, succes-

sors and attorneys, and each of you, are hereby specially restrained and enjoined from urging a hearing upon a certain petition filed by you, Frank F. Rogers, on the 4th day of October, 1928, in the Probate Court of the County of Oakland, Michigan, Calendar No. 23548, on Wednesday, December 5th, 1928, the date of hearing of said petition, or [fols. 61-63] at any other time thereafter and from impressing the court to grant the prayer of said petition and by its order appoint three commissioners as therein prayed, and to desist and refrain from prosecuting the proceedings initiated by said petition in said court, or before its commissioners, until the further order of this Court in the premises.

And, therefore, take notice that you, Detroit, Grand Haven & Milwaukee Railway Company, a Michigan corporation, H. W. Nelson Company a foreign corporation, and Frank F. Rogers, State Highway Commissioner for the State of Michigan, defendants herein, your agents, servants, deputies, attorneys and successors, and each of you, are hereby specifically restrained and enjoined from proceeding with the construction of said railway right-of-way, and a steam railroad, and railroad yards thereon, and any appurtenances thereto, and from doing any work of any kind, nature or description upon, across and over the property of Frank H. Dohany, plaintiff herein, said property being situated in the Northeast Quarter of Section 31, in the Township of Troy, Oakland County, Michigan, until the further order of this Court in the premises.

And it is ordered that you Frank F. Rogers, State Highway Commissioner for the State of Michigan; the Detroit, Grand Haven & Milwaukee Railway Company, a Michigan corporation, and the N. W. Nelson Company, a foreign corporation, defendants, appear before the undersigned District Judges of this Court, on the 17th day of December, A. D. 1928, at 9 o'clock A. M., and show cause, if any you have, why a preliminary injunction should not — issued as prayed in plaintiff's Bill of Complaint filed in this cause.

Arthur J. Tuttle, Charles C. Simons, Edward J. Moinet, District Judges.

Entered Dec. 4, 1928.

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF FRANK F. ROGERS, STATE HIGHWAY COMMISSIONER —Filed Jan. 3, 1929

The Answer of Frank F. Rogers, State Highway Commissioner of the State of Michigan, Defendant to the Bill of Complaint of Frank H. Dohany, Plaintiff.

I

The defendant admits the allegations contained in paragraph I of plaintiff's bill of complaint.

[fol. 65] II

The defendant admits the allegations contained in paragraph II of plaintiff's bill of complaint.

III

This defendant admits that he did hold a hearing on the matter of necessity on the 14th day of April, A. D. 1928, but says:

(a) In answer to sub-section (a), the testimony disclosed that, acting in the capacity of State Highway Commissioner, he was seeking to acquire certain properties for highway purposes and to be traded to the Detroit, Grand Haven & Milwaukee Railway Company for a part of its present right of way now necessary for the construction and improvement of state trunk line highway project No. M-063-3, otherwise known as Woodward Avenue, all in accordance with statutory authority and according to the terms of a certain contract between the state and the aforesaid railway company, as set forth in Act No. 340 of the Public Acts of 1927 of the State of Michigan.

(b) That the allegations contained in sub-section (b) are substantially correct when considered in conjunction with the facts set forth above.

(c) That the proceedings were and are now being conducted in conformity with Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927 of the State of Michigan, and by authority of Act No. 215 of the Public Acts of 1925 of the State of Michigan, but denies that the testimony discloses that the aforesaid Acts in any way deny to this plaintiff any right of just compensation as required by the Constitution of the United States [fol. 66] and of the State of Michigan. This defendant further says that the temporary restraining order issued out of this Court has prevented the appointment of commissioners to award compensation for the taking of this plaintiff's property and that until such commissioners have been appointed and have proceeded in accordance with the provisions of the aforesaid statutes, the measure of the alleged damage suffered by this plaintiff will not have been determined. This defendant denies that the aforesaid Acts in any way violate either the Constitution of the United States or the State of Michigan.

(d) That as to the allegations in sub-section (d), this defendant neither admits nor denies the truth thereof, but leaves this plaintiff to his proof thereof, but believes that the plaintiff's property will not be entirely cut off from approach to Woodward Avenue, but will in reality have free and unhindered avenues of approach to said street.

(e) That the testimony does not disclose that the allegations contained in sub-section (e) are true and, for further answer, says that all the things set up and alleged in this sub-section are matters of conjecture and surmise only and that, at the hearing on necessity, evidence bearing on these questions could not be properly presented or considered because the question of compensation for the taking of property was not before the Commissioner, because the so-called highway condemnation statutes provide for the appointment of three commissioners by the Court to appraise the properties and fix the compensation therefor at some time subsequent to the determination of the necessity for taking the property.

[fol. 67] IV

This defendants admits the allegations contained in paragraph IV of the plaintiff's bill of complaint and says that

the determination of necessity therein referred to was properly and lawfully made by this defendant and proper service made upon the plaintiff herein.

V

This defendant, in answer to paragraph V of the plaintiff's bill of complaint, denies that the evidence discloses that he awarded or refused to award plaintiff any consequential damages, or damages for depreciation in the value of the remainder of the tract from which land was being taken, and says that in making the determination of necessity, in accordance with statutory authority, he named a sum which in his opinion would fully compensate this plaintiff for all the damages he would suffer of any kind or nature whatsoever, and further says that the sum named in the determination of necessity was the amount which in his opinion would fully compensate this plaintiff for all property taken and damage suffered, and that it was just compensation as required by the Constitution of the State of Michigan and of the United States of America.

VI

This defendant, in answer to paragraph VI of the plaintiff's bill of complaint, admits that he has taken possession of and claims title to the property for and on behalf of the State of Michigan, and that it was taken for highway purposes and is being so used, and further says that the award set forth in the determination of necessity represents the [fol. 68] amount which in his opinion will fully compensate this plaintiff for the taking of this plaintiff's property. This defendant, for further answer, says that he is not required to make any special award separate and apart from any other award for consequential damages, or damages for diminution of value to the remainder of any tract of land, a part of which is being taken for highway purposes, or that he is required to make any special award for any kind of damages. This defendant for further answer says that the sum named in his determination of necessity represents the amount which in his opinion would fully compen-

sate this plaintiff for all the damage suffered and is full compensation for all the property taken.

VII

This defendant says, in answer to paragraph VII of plaintiff's bill of complaint, that he has no knowledge of the facts therein alleged, but leaves the plaintiff to his proof thereof, and further says that he believes, however, that the facts therein set forth are not true as to the amount of damage the said plaintiff will suffer, and as to the rest, says that they are not material even if found to be true.

VIII

This defendant says, in answer to paragraph VIII of the plaintiff's bill of complaint, that in acquiring properties for this highway project, including the lands belonging to the plaintiff, he has proceeded in accordance with the terms of the so-called highway condemnation statutes, and in accordance with the provisions of Act No. 215 of the Public Acts of 1925, and Act No. 340 of the Public Acts of 1927, but denies that any of these Acts in any way contravene the provisions of the Fourteenth Amendment to the Constitu-[fol. 69] tion of the United States, and further denies that these Public Acts or any of the steps he has taken in accordance with the terms thereof have in any way denied this plaintiff the equal protection of the laws or have not been in accordance with due process of law. This defendant further denies that Act No. 215 of the Public Acts of 1925 arbitrarily and capriciously places the plaintiff in a discriminate class, and deprives him of the privileges, rights and immunities preserved to and enjoyed by others under like circumstances and conditions and similarly situated. This defendant further denies that this plaintiff has been thereby deprived of any right of any nature whatsoever guaranteed to him by the Constitution of the United States or by the Constitution of the State of Michigan.

IX

This defendant, in answer to paragraph IX of the plaintiff's bill of complaint, admits the allegations contained in said paragraph are true.

X

This defendant, in answer to paragraph X of the plaintiff's bill of complaint, says that he has never taken any posistion with regard to this plaintiff's right to consequential damages, and denies that he has ever asserted that this plaintiff was not entitled to full and adequate compensation for the taking of his property. He further denies that the statutory provisions with regard to negotiating for the purchase of the plaintiff's property have in any way been violated, and further says that all constitutional requirements in that direction have been fully met and complied with. He further says that the highway condemnation statutes, as herein mentioned, confer adequate authority [fol. 70] upon the Commissioners to be appointed by the Probate Court of Oakland County to award this plaintiff just compensation as required by the Constitution of the United States of America and by the Constitution of the State of Michigan.

XI

This defendant, in answer to paragraph XI of the plaintiff's bill of complaint, says that he believes that the sections of the Compiled Laws of Michigan of 1915, as set forth in this paragraph of the bill of complaint, are substantially as therein set out, but denies that this plaintiff has any vested right to any particular kind of procedure set forth therein, and further denies that the procedure being used for the condemnation of this plaintiff's land will in any way deprive him of just compensation as required by the Constitution of the United States of America and the Constitution of the State of Michigan. This defendant further says that the provisions of the so-called Highway Condemnation Acts and the so-called Railroad Condemnation Acts, with respect to just compensation and the measure of damages, are substantially the same, and denies that the highway condemnation statutes under which he is proceeding will in any way violate any constitutional provision. This defendant, further answering, says that the property of this plaintiff is being taken for highway purposes and not for railroad purposes, and that the only procedure which this defendant is authorized to use is that now being applied.

XII

This defendant, in answer to paragraph XII of the plaintiff's bill of complaint, says that he has complied with all the statutory provisions of the so-called Highway Con-
[fol. 71] demnation Acts, and that the right of possession and title to the property is now vested in the State of Michigan. This defendant, further answering, says that the property is being devoted to a proper highway purpose in accordance with the constitution and statutes of the State of Michigan.

XIII

This defendant, in answer to paragraph XIII of the plaintiff's bill of complaint, denies that section 4 of Act No. 340 of the Public Acts of 1927, or any other provision thereof, contravenes the Fourteenth Amendment to the Constitution of the United States, and denies that it deprives the plaintiff of the constitutional guarantee of due process of law and the equal protection of the laws. He further denies that this plaintiff has any constitutional right to have the question of the necessity for taking his property determined by a jury in a court of record, as provided in the so-called Railroad Condemnation Acts, and denies that section 4 of Act No. 340 of the Public Acts of 1927, or any other part thereof, constitutes an arbitrary and capricious classification of the plaintiff and others owning land which is now being taken for the aforesaid highway project. This defendant further denies that this plaintiff is denied access to the tribunal designated by the general laws of the state, and says that all constitutional guarantees with regard to due process and the equal protection of the laws have been carefully preserved to this plaintiff.

XIV

This defendant, in answer to paragraph XIV of the plaintiff's bill of complaint, denies that the said Railway
[fol. 72] Company is granted any special immunity of any kind, and denies that the provisions of the Fourteenth Amendment to the Constitution of the United States of America are in any way violated, and denies that Act No. 340 of the Public Acts of 1927 and Act No. 352 of the

Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, are void.

XV

This defendant, in answer to paragraph XV of the plaintiff's bill of complaint, denies that the proceedings being taken by this defendant, in accordance with the terms of the so-called Highway Condemnation Acts, constitute a denial of this plaintiff and other railroad companies within the State of Michigan of the equal protection of the laws, in contravention of the Fourteenth Amendment of the Federal Constitution, or of the Constitution of the State of Michigan.

XVI

This defendant in answer to paragraph XVI of the plaintiff's bill of complaint, denies that Article 13, Section 1, of the Constitution of the State of Michigan is in any way violated by any act of this defendant, or any of the defendants, and denies that the so-called Highway Condemnation Acts under which he is proceeding will in any way deprive this plaintiff of any part of the just compensation required to be paid him under the provisions of our State Constitution.

(b) This defendant denies that Article 2, Section 16, of the Constitution of the State of Michigan is in any way violated, and expressly denies that he has been deprived of the right to make a proper claim for all damage which he may suffer by reason of the State's taking part of his [fol. 73] property for highway purposes. This defendant further says that the time and place for this plaintiff to present his claim or claims for compensation is before the Commissioners to be appointed by the Probate Court of Oakland County, after the temporary restraining order heretofore issued out of this Court in this cause has been set aside and dismissed, and not until then.

(c) This defendant denies that Article 1, Section 2, of the Constitution of the State of Michigan will be violated in any way, and that the plaintiff will be denied the equal protection of the laws, and his property taken without due process of law.

(d) This defendant denies that Article 2, Section 13, of the Michigan Constitution will be violated in any way, and says that this plaintiff does not possess any constitutional right to have a jury pass upon his measure of damages.

(e) This defendant denies that Article 13, Section 2, of the Constitution of the State of Michigan is in any way violated, and says that the act of the legislature authorizing this defendant to acquire this plaintiff's property, together with other property, for the purpose of trading it for a part of the present right of way of the Detroit, Grand Haven & Milwaukee Railway Company, does not deprive this plaintiff, or any other land owner, of any right guaranteed to him by either the Constitution of the United States of America or of the State of Michigan, and that this plaintiff's property is being acquired for highway purposes under the proper statutes, and that this plaintiff will obtain just compensation for the taking of his property.

(f) This defendant denies that Article 5, Section 21, of the Michigan Constitution is in any way violated by Act [fol. 74] No. 340 of the Public Acts of 1927, and denies that the title is too narrow.

XVII

This defendant, in answer to paragraph XVII of the plaintiff's bill of complaint, denies that the taking of this plaintiff's property, and all other property in accordance with the provisions of Act No. 340 of the Public Acts of 1927 and the other Acts pertaining thereto, is not a public necessary, and further denies that the surrender of the railway franchise is not a public necessity, and further denies that the taking of the present right of way of the Railway Company as described in this paragraph is not a public necessity. This defendant further says that the necessity for widening Woodward Avenue, for taking the present right of way of the Railway Company, for relocating the line of the Railway Company, for taking this plaintiff's land and other properties for the purpose of exchanging with the Railway Company, and the necessity for taking all the separate and individual pieces of property

needed, has been duly and lawfully determined. This defendant further says that the widening of Woodward Avenue and the securing of this plaintiff's property and others for the purpose of exchanging it with the Railway Company is part of one project and one project only, and inseparately linked and connected together.

XVIII

This defendant, in answer to paragraph XVIII of the plaintiff's bill of complaint, admits that Section 1 of Act No. 340 of the Public Acts of 1927 is substantially as set forth by the Plaintiff.

[fol. 75] XIX

This defendant, in answer to paragraph XIX of the plaintiff's bill of complaint, says that the State of Michigan is now proceeding to procure properties, including the plaintiff's land, for a proper highway purpose, and that this defendant is exercising the power of eminent domain for and on behalf of the State of Michigan in procuring such property for a proper highway purpose, and denies that in so doing this plaintiff is in any way deprived of any vested rights guaranteed to him by the Constitution of the United States of America or by the Constitution of the State of Michigan, and denies that the Acts under which he is proceeding to acquire this property contravene any of the provisions of the Fourteenth Amendment to the Constitution of the United States by granting a special immunity to the Railway Company from any liability, and by depriving the plaintiff of any vested rights, privileges or immunities which he may possess under the so-called Railway Condemnation Act. This defendant, further answering, denies that this plaintiff is being deprived of the equal protection of the laws and that his property is being taken without due process of law.

XX

This defendant, in answer to paragraph XX of the plaintiff's bill of complaint, denies that Act No. 340 of the Public Acts of 1927 is unconstitutional in any way, and denies that the Probate Court of the County of Oakland is without

jurisdiction to grant the prayer of this defendant's petition [fol. 76] filed in the said Court on October 4, 1928, or to entertain any proceedings thereunder.

XXI

This defendant, in answer to paragraph XXI of the plaintiff's bill of complaint, admits that the acquirement of the plaintiff's property and other lands for the purpose of trading to the Railway Company for its present right of way, and the acquirement of the present right of way of the Railway Company and the construction of the Woodward Avenue project, as a whole, are all integral parts of one project, but denies that this fact or that the provisions of Act No. 340 of the Public Acts of 1927, or of Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, in any way contravene the provisions of the Fourteenth Amendment to the Constitution of the United States, in that this plaintiff is deprived of his property without due process of law, or that he is denied the equal protection of the laws.

XXII

This defendant, in answer to paragraph XXII of the plaintiff's bill of complaint, admits that he intends complying with the provisions of the highway condemnation statutes, and intends proceeding thereunder, but denies that this plaintiff will be deprived of any portion of his property without just compensation being made therefor, and further denies that the statutes under which he is now proceeding will in any way deprive this plaintiff of any part of his just compensation for the taking of his property. This defendant further denies that this plaintiff is in any way entitled to any of the relief prayed for.

[fol. 77]

XXIII

This defendant, further answering plaintiff's bill of complaint, says that all the questions raised by this plaintiff relative to the measure of damages to be used in fixing the compensation to be paid for the taking of his property are raised prematurely because the time for making an award has not yet arrived, because this defendant has been re-

strained by this Court in this action from causing the probate Court for the County of Oakland to appoint commissioners to take testimony and make an award to this plaintiff. Until the commissioners have been appointed and have acted under the direction of the probate Court for the County of Oakland, neither this plaintiff nor anyone else can know what their act may be.

XXIV

This defendant, further answering, says that this plaintiff has not set forth in his bill of complaint a short and plain statement of the claimed grounds upon which this Court's jurisdiction depends.

XXV

This defendant, further answering, says that all the condemnation proceedings have been conducted in the name and for and on behalf of the State of Michigan, and that the defendant, the Detroit, Grand Haven & Milwaukee Railway Company and the defendant, the H. W. Nelson Company, have been acting for and on behalf of the said State.

[fol. 78] XXVI

This defendant, further answering, says that this Court is without jurisdiction to enjoin the process of the probate Court of Oakland County, and is without jurisdiction to grant the relief asked for in said application for injunction, and that this Court is wholly without jurisdiction and this defendant therefore prays that the said bill of complaint be dismissed and the temporary restraining order heretofore issued out of this Court be dissolved and the relief prayed for be denied because:

(1) This Court is without jurisdiction to entertain same;

(2) The plaintiff's bill of complaint does not state a cause arising under the constitution and laws of the United States of America;

(3) The bill of complaint does not present any substantial Federal question;

(4) The plaintiff is not entitled to the relief prayed for;

(5) The questions raised in the bill of complaint as to measure of damages to be applied are prematurely raised;

(6) The questions raised have been determined as shown by Schedules A and B attached hereto and made a part hereof;

(7) The bill of complaint does not set up a concise statement of the grounds relied upon to confer jurisdiction upon this Court;

(8) It appears in the complaint filed in this cause that the plaintiff and this defendant and the defendant, the [fol. 79] D. G. H. & M. Railway Company, are all citizens of the State of Michigan, and therefore there is no diversity of citizenship from which this Court may have jurisdiction;

(9) The rule of law as laid down by our Supreme Court as to the right to recover consequential damages or for the diminution in value of the remainder of a tract of land where part is taken has been and is favorable to the contentions of the plaintiff, and for that reason if he should be denied recovery in the present condemnation proceedings now pending, it will be in violation of the law of this state.

Wilber M. Brucker, Attorney General; K. F. Clardy, Assistant Attorney General, Attorneys for Defendant.

Dated at Lansing, Michigan, this 29th day of December, 1928.

[File endorsement omitted.]

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

JOINT AND SEVERAL ANSWER OF DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY AND THE H. W. NELSON COMPANY—Filed Jan. 10, 1929

The Detroit, Grand Haven and Milwaukee Railway Company and the H. W. Nelson Company, defendants in the above entitled cause, by H. R. Martin and H. V. Spike, their

[fol. 81] attorneys, saving and reserving to themselves all manner of objection to the many irregularities, insufficiences, and errors in the plaintiff's bill of complaint contained, for answer thereto, say:

(1) On information and belief they admit the allegations contained in paragraph I of the bill of complaint.

(2) On information and belief they admit the allegations contained in paragraph II of the bill of complaint. Further answering said paragraph II these defendants aver that the notice set out in full in said paragraph was given by personal service and publication by the defendant, Frank F. Rogers, State Highway Commissioner in and for the State of Michigan, for the purpose of commencing condemnation proceedings for the acquiring by the State of Michigan of the land therein described for public highway purposes in accordance with the statutes in such case made and provided.

(3) Answering paragraph III of the bill of complaint, these defendants admit that a hearing was had by the said Frank F. Rogers, State Highway Commissioner, on the 14th day of April, A. D. 1928, at the hour and place set forth in the notice described in paragraph II of the bill of complaint, at which time testimony was taken, but as to what the testimony so taken disclosed, as alleged in the various subdivisions of said paragraph III of the bill of complaint, these defendants say:

(a) In answer to subdivision (a) of said paragraph III these defendants deny that the testimony taken at said hearing disclosed that the defendant Frank F. Rogers, State Highway Commissioner, was seeking to acquire a right of way for the defendant Detroit, Grand Haven and Milwaukee [fol. 82] Railway Company, within the meaning of the language used in said subdivision (a), and in explanation thereof these defendants allege that the State of Michigan has for several years been engaged in the work of widening, and otherwise improving, Woodward Avenue, so-called, from the county line between Wayne and Oakland Counties, Michigan, to Pontiac in said Oakland County, Michigan; that said Woodward Avenue is a Federal aided road and a State trunk line highway, now known as United States Road No.

10, the construction, improvement and maintenance of which is under the supervision, direction and control of the State Highway Commissioner; that in the widening, and otherwise improving, of said Woodward Avenue the said State Highway Commissioner is acting as an agency of the State of Michigan in the performance of a governmental function; that the present railroad right of way of the defendant Detroit, Grand Haven and Milwaukee Railway Company parallels, and is immediately adjacent to, said Woodward Avenue, on the Northeasterly side thereof, from Royal Oak to Bloomfield Hills, all in Oakland County, Michigan, a distance of approximately nine miles; that in the widening and improving of said Woodward Avenue it became necessary, in the opinion of the said State Highway Commissioner, to acquire the present right of way of the defendant, Detroit, Grand Haven and Milwaukee Railway Company, where it parallels, and is immediately adjacent to, said highway, as above mentioned; that on July 20, 1927, a contract was entered into between the State of Michigan and the defendant, Detroit, Grand Haven and Milwaukee Railway Company providing, among other things, for the conveyance by said Railway Company to the State of Michigan of the Railway Company's said present right of way between the [fol. 83] points aforesaid, in exchange for a new right of way to be acquired by the State of Michigan in a location approximately three-quarters of a mile Easterly from the present railway right of way, said contract having been authorized by Act No. 340 of the Public Acts of 1927 of the State of Michigan and being the contract attached to the bill of complaint as Exhibit A; that the acquiring of the said new right of way was and is for public highway purposes and that the hearing held on the 14th day of April, 1928, as alleged in said paragraph III of the bill of complaint, was for the purpose of determining the necessity for said public highway widening and improvement and the necessity of taking the lands described in the notice set out in paragraph II of the bill of complaint for such purpose.

(b) Answering subdivision (b) of said paragraph III of the bill of complaint, these defendants admit that the allegations therein contained are substantially correct when considered in connection with the facts set forth above in answer to subdivision (a) of said paragraph III of the bill of complaint.

(c) Answering subdivision (c) of said paragraph III of the bill of complaint, these defendants admit that the proceedings therein mentioned were being conducted in conformity with Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927 of the State of Michigan, and by authority of Act No. 215 of the Public Acts of 1925 of the State of Michigan. They also show unto the Court that said proceedings were likewise by authority of Section 23 of said Act No. 352 of the Public Acts of 1925. They deny that said Acts, or any of them, or any part of them, permits the allowance of damages only for land actually taken for highway purposes and do not [fol. 84] authorize the allowance of damages for diminution of the value of the remainder of a tract of land from which land for a right of way is taken and they allege that said Acts, and each of them, authorize and permit the allowance of just compensation for the taking of land thereunder within the full meaning of that term as used in the Constitutions of the State of Michigan and the United States.

(d) Answering subdivision (d) of said paragraph III of the bill of complaint, these defendants admit that the allegations therein contained are substantially correct, except that they deny that plaintiff's land will be entirely cut off from access to Woodward Avenue and allege that said land will have substantially as free and easy access to Woodward Avenue as at present. Further answering said subdivision (d), these defendants deny that the facts therein alleged constitute a cause of action or give plaintiffs any legal ground for complaint, even if true.

(e) Answering subdivision (e) of said paragraph III of the bill of complaint these defendants deny the allegations therein contained and show unto the Court that all the matters therein alleged are matters of conjecture and surmise only.

(4) These defendants admit the allegations contained in paragraph IV of the bill of complaint and show unto the Court that the document therein set forth is a determination of necessity for the construction and improvement of Woodward Avenue, so-called, as hereinabove described in answer to subdivision (a) of paragraph III of the bill of complaint, and of the necessity for the taking of the par-

ticular lands described, including that portion of plaintiff's land therein described, for such public highway purpose, and a statement of the damages which, in the opinion of [fol. 85] the said State Highway Commissioner, should be paid to the several owners of the property therein described, including the plaintiff herein, as compensation for the taking of said property for such purpose and that said document wae made, filed and served on plaintiff in accordance with law.

(5) Answering paragraph V of the bill of complaint these defendants admit that the determination of necessity mentioned in paragraph IV of the bill of complaint, and as further described in the answer to said paragraph IV aforesaid, stated that the damages to be paid as compensation for the taking of plaintiff's land, as therein described, was the sum of money therein alleged, but these defendants show unto the Court that the statement of damages as contained in the determination of necessity is not a final determination of plaintiff's damages but is only a statement of the damages which, in the opinion of the State Highway Commissioner, as of that time, should be allowed as compensation for the taking of the land described and that said Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, of the State of Michigan, provides for the appointment by a court of record of three court commissioners who shall hear the parties and make an award of the damages which should be paid as compensation for the taking of the land described but that the proceedings for the appointment of said court commissioners to determine such damages were enjoined by a restraining order issued by this Court on the petition of Frank H. Dohany, plaintiff, and one of plaintiff's attorneys. Further answering said paragraph V of the bill of complaint these defendants deny that Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, [fol. 86] prohibits the allowance of damages for the depreciation of the value of the remainder of a tract of land from which a portion is taken and allege that said Act, as amended, permits and requires the awarding to all persons from whom property is taken of just compensation within the full meaning of that term as used in the Constitutions of the State of Michigan and of the United States.

(6) Answering paragraph VI of the bill of complaint, these defendants admit that the said Frank F. Rogers, State Highway Commissioner, has taken possession of the land therein mentioned and that a contract has been entered into with the defendant, H. W. Nelson Company, and that work was begun on said land, as therein alleged, but these defendants deny that the taking of possession, the letting of said contract, and the commencing of said work, was done without lawful authority. Further answering said paragraph VI, these defendants deny that there will be any diminution in the value to the emainder of plaintiff's tract of land and allege that said land is, by reason of its location, essentially industrial property; that the natural and reasonably to be expected development thereof will be for industrial purposes and that the value of the remainder of the tract of land after the construction and operation of a railroad on the land taken in the condemnation proceedings, as hereinabove described, will be equal to, or in excess of, the value of said remainder before the taking. They deny that there was any competent evidence in the hearing mentioned in paragraph III of the bill of complaint, and more particularly described in the answer to said paragraph III, that the value of the remainder of plaintiff's tract of land will be diminished in value and, on information and belief, allege that the State Highway Commissioner awarded just [fol. 87] compensation for the taking of plaintiff's land within the full meaning of that term as used in the Constitutions of the State of Michigan and of the United States. They further allege that the taking of possession of plaintiff's land, the entering into a contract with the H. W. Nelson Company, and the commencing of work, were all in accordance with the statute in such case made and provided and in accordance with the laws and Constitutions of the State of Michigan and of the United States.

(7) Answering paragraph VII of the bill of complaint, these defendants neither admit nor deny the contents thereof but leave plaintiff to his proof, except that they deny that the value of plaintiff's land will be diminished in the amount therein alleged, or in any amount, but allege that the value will, in fact, be increased. These defendants further allege that none of the matters averred in said paragraph VII are material to the issues of this cause, even if the same should be found to be true.

(8) Answering paragraph VIII of the bill of complaint, these defendants admit that said Act No. 340 of the Public Acts of 1927 of the State of Michigan authorizes and empowers the defendant, Frank F. Rogers, as State Highway Commissioner for the State of Michigan, to acquire, on behalf of the State of Michigan, the lands described in the contract dated July 20, 1927, between the State of Michigan and the Detroit, Grand Haven and Milwaukee Railway Company, in accordance with the general laws of the State of Michigan. They deny that Act No. 215 of the Public Acts of 1925 authorizes the State Highway Commissioner to proceed under the Railway Condemnation Act, so-called, for the acquiring of said new right of way. They admit that the [fol. 88] said State Highway Commissioner has proceeded under and in accordance with the Highway Condemnation Act, co-called, being Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927 of the State of Michigan. They deny that Act No. 215 of the Public Acts of 1925 contravenes either the due process law or the equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States or that said Act is unconstitutional for either of said reasons or for any other reason. They deny that Act No. 215 of the Public Acts of 1925 arbitrarily and capriciously places the plaintiff in a discriminate class, or that said Act deprives him of the privileges, rights and immunities preserved to and enjoyed by others under like circumstances and conditions and similarly situated and they deny that said Act No. 215 would permit the State Highway Commissioner, in this instance the defendant Frank F. Rogers, to ultimately acquire for the defendant, Detroit, Grand Haven and Milwaukee Railway Company, a right of way through plaintiff's lands without incurring liability to plaintiff for the just compensation required by the Constitutions of the State of Michigan and of the United States. Further answering said paragraph VIII, these defendants deny that the proceedings taken, and being taken, by the defendant, Frank F. Rogers, as State Highway Commissioner for the State of Michigan, contravene either the due process law or the equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States, or that said proceedings are unconstitutional in any respect.

(9) Answering paragraph IX of the bill of complaint, these defendants admit the allegation therein contained and further show unto the Court that the filing of said petition was in accordance with law and if the proceedings in-
[fol. 89] stituted thereby are not restrained plaintiff will be awarded just compensation for the property owned by him and taken for the public highway improvement hereinabove described.

(10) Answering paragraph X of the bill of complaint, these defendants, on information and belief, deny that the defendant Frank F. Rogers has ever contended that plaintiff was not entitled to any consequential damages and, on information and belief, allege that the said State Highway Commissioner has at all times contended, and now contends, that plaintiff's remaining lands will not be damaged or diminished in value by reason of the taking of the lands described in the condemnation proceedings and that the negotiations between said defendant and the plaintiff were for the payment of just compensation as required by the Constitutions of the State of Michigan and of the United States. They deny that under the provisions of the statute under which said proceedings were commenced it will be without and beyond the power and duty of the commissioners to be appointed by the probate court, as prayed for in the petition mentioned in paragraph IX of the bill of complaint, to award plaintiff any consequential damages and allege that under the provisions of said statute the said court commissioners, to be appointed as aforesaid, will be authorized and permitted, and it will be their duty, to award to plaintiff full just compensation within the meaning of the Constitutions of the State of Michigan and of the United States and that said statute fully authorizes said court commissioners so to do. These defendants further deny that it is material to the issues of this cause whether plaintiff would be otherwise entitled to be awarded other damages under the laws of the State of Michigan were his lands being taken by a railroad company in the State of Michigan for railroad purposes.

[fol. 90] (11) Answering paragraph XI of the bill of complaint, these defendants admit that the provisions of Sec-

tions 8249, 8250, 8254, 8255 and 8257 of the Compiled Laws of 1915 of the State of Michigan are substantially as set forth in said paragraph XI. Further answering said paragraph XI, these defendants deny that the plaintiff, with respect to the taking of his lands for the public highway purpose hereinabove described, has any vested rights by virtue of the Railway Condemnation Act, so-called, or that said Railway Condemnation Act gives to plaintiff any advantages, immunities or privileges which are, or will be, unconstitutionally affected by the proceedings instituted by the State Highway Commissioner in the probate court of Oakland County, Michigan, as aforesaid. They allege that the said State Highway Commissioner is lawfully and constitutionally permitted to acquire plaintiff's lands for the public highway purpose aforesaid, under and in accordance with the Highway Condemnation Act aforesaid and that plaintiff will not be unconstitutionally deprived of any benefits of the common law applicable to the measure of damages.

(15) In answer to paragraph XV of the bill of complaitn, these defendants admit the allegations therein contained but show unto the Court that the title and right to possession has legally vested in the State of Michigan under and by virtue of the laws of the State of Michigan and that plaintiff has not been unlawfully divested of his right of possession and occupancy of said property. Further answering said paragraph XII these defendants allege that the possession of said property by the Detroit, Grand Haven and Milwaukee Railway Company, and by the H. W. Nelson Company, is in their capacity as agencies of the State of Michigan and that the said Detroit, Grand Haven and [fol. 91] Milwaukee Railway Company has been, and is, acting in the premises solely as an agency of the State; that their possession is the possession of the State.

(13) They deny the allegations contained in paragraph XIII of the bill of complaint.

(14) They deny the allegations contained in paragraph XIV of the bill of complaint.

(15) In answer to paragraph XV of the bill of complaint, these defendants deny that the proceedings being taken by the defendants are to procure a railway right of way, as

that term is commonly used and applied, but say that the proceedings are in accordance with the statutes of the State of Michigan to procure property necessary to be acquired for a public improvement, to-wit the widening of Woodward Avenue, as aforesaid, and these defendants deny the allegations contained in said paragraph XV of the bill of complaint.

(16) They deny the allegations contained in paragraph XVI of the bill of complaint, including in said denial the allegations contained in each of the subdivisions of said paragraph XVI.

(17) They deny the allegations contained in paragraph XVII of the bill of complaint.

(18) Answering paragraph XVIII of the bill of complaint, these defendants admit that Section 1 of Act No. 340 of the Public Acts of 1927 of the State of Michigan contains the provision set out in said paragraph XVIII and that Section 10 of said Act contains the contract between the State of Michigan and the Railway Company attached to the bill of complaint and marked Exhibit A. Further answering said paragraph XVIII, these defendants deny [fol. 92] that the State of Michigan is acting, or has ever contended that it was acting, as the agent of the Railway Company, and aver that the State of Michigan has at all times, and now is, acting in the premises in its capacity as one of the sovereign states of the United States in acquiring plaintiff's land, as aforesaid, in the performance by the State of a governmental function, to-wit, the widening, and otherwise improving, of said Woodward Avenue. They deny that the State has withdrawn from the Railway Company, either with or without its consent, or that it has been, or is, necessary, that the State should withdraw from the Railway Company, either with or without its consent, the power to exercise the right of eminent domain, but say that the State of Michigan is now exercising the right of eminent domain to acquire plaintiff's land by virtue of valid and constitutional laws of the State of Michigan. They deny that plaintiff has any vested rights in the Railway Condemnation Law, so-called, other than such rights as are secured to him by virtue of the Constitutions of the State of Michigan and of the United States, and as to such rights the

status of plaintiff has not, and will not be, changed by reason of the proceedings commenced by the State Highway Commissioner, as aforesaid. They deny that Sections 1 and 10 of said Act No. 340 of the Public Acts of 1927 of the State of Michigan are in contravention of the Fourteenth Amendment to the Constitution of the United States or that said Sections, or either of them, grant to the Railway Company any special immunity or deprive plaintiff of equal immunities, privileges and vested rights contrary to either the Constitution of the State of Michigan or the Constitution of the United States, and they deny that said Sections 1 and 10 of said Act No. 340 of the Public Acts of 1927 of the State of Michigan, or either of them, deny to plaintiff the [fol. 93] the equal protection of the laws or deprive plaintiff of his property without due process of law.

(19) Answering paragraph XIX of the bill of complaint, these defendants deny the allegations therein contained and aver that the Probate Court of Oakland County, Michigan, does have the jurisdiction and power to grant the petition of the defendant Frank F. Rogers, State Highway Commissioner, filed in said Court on October 4, 1928, and has full power and authority to entertain the proceedings thereunder and contemplated thereby.

(20) In answer to paragraph XX of the bill of complaint, these defendants admit that the acquiring of the present right of way of the Railway Company for highway purposes, and the acquiring by condemnation of plaintiff's lands for the purpose set out in Act No. 340 of the Public Acts of 1927, constitute one project under the provisions of said Act No. 340 of the Public Acts of 1927, and that Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, of the State of Michigan, is being utilized by the defendant, Frank F. Rogers, State Highway Commissioner for the acquiring of plaintiff's land for said project but they deny that said Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, is, for this reason, or for any other reason, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States and they deny that said Act deprives plaintiff of his property without due process of law or denies plaintiff the equal protection of the laws and they deny that said Act is void.

(21) Answering paragraph XXI of the bill of complaint, these defendants admit that the said Frank F. Rogers, [fol. 94] State Highway Commissioner, intends to comply with all of the provisions of the Highway Condemnation Law, as hereinabove described, and that it is his intention to ask the Probate Court of Oakland County, Michigan, to grant the prayer of his petition and to appoint three court commissioners to view the premises described in said petition, to hear the proofs and allegations of the parties and to appraise the damages to be paid as compensation for the taking of the property described in said petition for the public highway purpose therein described and hereinabove set forth and that he intends to continue the prosecution of said proceedings to a conclusion, in accordance with the statutes in such case made and provided, but he denies that the appraisal of the damages to be paid as compensation for the taking of plaintiff's land will deprive plaintiff of any damages guaranteed to him under the Constitution of the State of Michigan or the Constitution of the United States. They deny that in said proceedings plaintiff will suffer an irreparable loss in the amount set forth in said Paragraph XXI, or in any other amount, but aver that said court commissioners will be authorized and empowered, and will be required, to award just compensation within the meaning of that term as used in the Constitutions of the State of Michigan and of the United States and they deny that the said defendant, Frank F. Rogers, ought to be restrained by the injunction of this Honorable Court in the manner and form therein alleged, or that plaintiff is entitled to any of the relief prayed for in said bill of complaint.

Wherefore defendants pray that the bill of complaint filed by the plaintiff may be dismissed, with proper costs and expenses by these defendants unlawfully sustained.

[fol. 95] Motion to Dismiss

Further answering said bill of complaint, these defendants say:

I. That the contract dated July 20, 1927, between the State of Michigan and the Detroit, Grand Haven and Milwaukee Railway Company, attached to the bill of complaint as Exhibit A, and Act No. 340 of the Public Acts of 1927

of the State of Michigan, authorizing said contract, both of which are made a part of the bill of complaint, disclose, on their face, that the Detroit, Grand Haven and Milwaukee Railway Company is acting in the premises only as an agency of the State; that the H. W. Nelson Company, the contractor doing the actual work of grading, is a sub-agent of the State of Michigan and that all acts complained of and all acts done, or contemplated being done, in the premises, have been, are, and will be, the acts of the State of Michigan; that all such acts have been, are being, and will be, done by the State of Michigan in its capacity as a sovereign state in the performance of a governmental function; that the cause of action is, therefore, in reality, against the State of Michigan and not against the Detroit, Grand Haven and Milwaukee Railway Company and the H. W. Nelson Company, except in their capacities as agencies of the State of Michigan. Consequently, there is no such diversity of citizenship as is required to give this Court jurisdiction of the subject matter.

II. That prior to the commencement of this cause plaintiff filed, in the Supreme Court of the State of Michigan, an application for a Writ of Certiorari to review the determination of necessity of the State Highway Commis-[fol. 96] sioner, made, filed and served as hereinabove set forth, in which substantially the same questions were raised as are raised by the bill of complaint filed herein. Said application for a Writ of Certiorari has never been passed upon by the Supreme Court of the State of Michigan, has never been withdrawn by the plaintiff, and is still pending in the said Supreme Court of the State of Michigan as a cause of action between substantially the same parties as are parties to the instant cause of action and in which the same questions are raised. Consequently, this Court is without jurisdiction to hear and determine the case at bar.

III. That the claimed violations of the Constitution of the United States, as set up in the bill of complaint, are based upon the single contention of plaintiff that Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, of the State of Michigan, does not authorize or permit the court commissioners appointed

by a court of record, in the manner provided in said Act, as amended, to award any compensation for the diminution in value of the remainder of a parcel of land from which a portion is taken for the public highway purpose described in the proceeding.

Said Act, as amended, known as the Highway Condemnation Law, has been interpreted by the Supreme Court of the State of Michigan as permitting and requiring said court commissioners to award damages for such diminution in value. Such an interpretation secures to plaintiff just compensation within the meaning of that term as used in both the State and the Federal Constitutions. As thus interpreted, plaintiff will not be deprived of property with- [fol. 97] out due process of law and will not be denied the equal protection of the laws. The bill of complaint, therefore, does not present a Federal question.

IV. That all questions as to the interpretation of Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, of the State of Michigan, of Act No. 340 of the Public Acts of 1927 of the State of Michigan, of the contract between the State of Michigan and the Detroit, Grand Haven and Milwaukee Railway Company dated July 20, 1927, and of Act No. 215 of the Public Acts of 1925, so far as the same relate to a claimed violation of the Constitution of the State of Michigan, have been determined by the Supreme Court of the State of Michigan adversely to the claims of plaintiff.

V. That the bill of complaint does not set up the grounds upon which it is claimed that the Federal Court has jurisdiction as required by Subdivision 2 of United States General Equity Rule No. 25.

These defendants therefore move the Court to dismiss the bill of complaint, prior to a hearing on the merits, for the following reasons:

I. Because the bill of complaint, and the exhibits thereto attached, show that there is no such diversity of citizenship as is required to vest this Court with jurisdiction of said cause.

II. Because substantially the same cause of action is now pending in a cause commenced by plaintiff in the Supreme Court of the State of Michigan prior to the commencement of this action.

III. Because the Supreme Court of the State of Michigan has interpreted Act No. 352 of the Public Acts of 1925, [fol. 98] as amended by Act No. 92 of the Public Acts of 1927, Act No. 215 of the Public Acts of 1925 and Act No. 340 of the Public Acts of 1927, of the State of Michigan, together with the contract authorized in the latter Act, contrary to the contentions of plaintiff. This Court is bound by the interpretation of said Acts and contract as placed thereon by the Supreme Court of the State of Michigan and as so interpreted the bill of complaint does not present a Federal question.

IV. Because the bill of complaint does not set up the grounds upon which it is claimed that the Federal Court has jurisdiction as required by Subdivision 2 of United States General Equity Rule No. 25.

V. Because the bill of complaint does not disclose any violation of the Constitution of the State of Michigan.

VI. Because the bill of complaint does not disclose any violation of the Constitution of the United States.

VII. Because the questions raised in the bill of complaint as to the proper measure of damages to be paid as compensation for the taking of plaintiff's land are prematurely raised. Such questions should await the confirmation of the report of the court commissioners appointed by the Probate Court in the manner provided by statute for the appraising of the damages to which plaintiff will be entitled.

VIII. Because the bill of complaint does not set up a cause of action.

IX. Because there is no equity in the bill of complaint.

X. Because the Court has no jurisdiction.

[fols. 99 & 100] XI. Because the plaintiff is not entitled to the relief prayed for.

H. R. Martin and H. V. Spike, Attorneys for Defendants Detroit, Grand Haven and Milwaukee Railway Company and H. W. Nelson Company. Business address: 400 E. Jefferson Avenue, Detroit, Michigan.

Duly sworn to by H. V. Spike. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 101] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

No. 3118

FRANK H. DOHANY, Plaintiff,

vs.

FRANK F. ROGERS, State Highway Commissioner, et al., Defendants

No. 3122

CHARLES E. DOHANY, Plaintiff,

vs.

FRANK F. ROGERS, State Highway Commissioner, et al., Defendants

No. 3236

EUGENE WALTON et al., Plaintiffs,

vs.

GROVER DILLMAN, State Highway Commissioner, et al., Defendants

[fol. 102] OPINION—Filed June 25, 1929

Before Hickenlooper, Circuit Judge, and Tuttle and Moinet, District Judges

TUTTLE, District Judge:

These causes, which involve the same questions and are being tried together, are before this Court, constituted and

sitting pursuant to the provisions of Section 380 of Title 28 of the United States Code (formerly known as Section 266 of the Judicial Code), on an application for an interlocutory injunction to restrain the State Highway Commissioner of the State of Michigan from prosecuting certain condemnation proceedings in the courts of said state in the enforcement of certain statutes of such state, on the ground that such statutes, as sought to be so enforced, deprive the plaintiffs of their property without due process of law and deny to them the equal protection of the laws in vi-lation of the Fourteenth Amendment to the Federal Constitution.

The condemnation proceedings in question were instituted by the State of Michigan for the purpose of taking, by right of eminent domain, certain land of the plaintiffs which was deemed, and had been formally declared, by the legislature and other proper officials of said state, to be required for public use in the necessary widening and improvement of the main public state trunk highway connecting the cities of Detroit and Pontiac in Michigan. In the widening of such highway, it became necessary for the state to provide for the removal and relocation of certain railroad tracks of the defendant Detroit, Grand Haven & Milwaukee Railway Company immediately adjoining said highway and located on land needed for such widening. Thereupon, the state decided to acquire, by condemnation, other land near said tracks and to convey such land to said railway company in exchange for its land so needed, and the railway agreed to this substitution of a new right of way for the old, the removal of its tracks to such new right of way, and the conveyance *ot* its former right of way to the state for the highway purposes so desired. By Act 340 of the Public Acts of Michigan of 1927, the Michigan legislature declared this project to be a public necessity, authorized the State Highway Commissioner to acquire, "on behalf of the state by purchase or condemnation, in accord- [fol. 103] ance with the general laws of the State of Michigan," the land required for this purpose and provided for the conveyance of such land, when so acquired, to the railway in exchange for the right of way which it was to convey to the state, all as part of the highway improvement project in question.

Act 215 of the Michigan Public Acts of 1925 provides that whenever the line of any railway is upon or adjacent to a

trunk line highway and its acquisition is necessary for widening or otherwise improving such highway, the State Highway Commissioner is authorized to agree with such railway for the exchange of its right of way for other property and, after such agreement, "to acquire such other property by purchase or condemnation, and when acquired" to make such exchange accordingly "for such public highway purposes." Act 352 of the Michigan Public Acts of 1925, as amended by Act 92 of the Public Acts of 1927, prescribes the procedure applicable to the condemnation proceedings in such a case, including the manner of making just compensation for property so condemned.

The state, through its State Highway Commissioner, having instituted, in the proper state courts, the condemnation proceedings provided by these statutes, property owners affected thereby opposed such proceedings, raising various objections to the validity thereof and urging that such statutes violated several provisions of the constitution of Michigan. The Michigan Supreme Court, in the case of Fitzsimons & Galvin, Inc. vs. Rogers, 243 Mich. 649, in a well reasoned opinion, which described the general situation also presented here, considered and discussed those objections and overruled them, holding that the statutes in question were not contrary to the state constitution and that they authorized the condemnation proceedings taken. Although the constitutional objections so overruled are also urged here, this court of course, under familiar law, should accept and follow that decision of the state court of last resort as sustaining the validity under the Michigan constitution of these statutes and their applicability to these proceedings. Rindge Company vs. Los Angeles County, 262 U. S. 700.

I have carefully considered the various grounds on which these state statutes are asserted to be in contravention of the Federal Constitution, but find no merit in any of the contentions urged.

It is claimed by the plaintiffs that, because their land, if taken as sought, will itself be used not by the state as a part of the proposed new highway, but by a railway com- [fol. 104] pany as a part of its right of way, such land is being taken not for highway purposes, within the meaning of the law, but for railroad purposes, and that there-

fore it cannot be condemned under the so-called highway condemnation statutes of Michigan, as the state is seeking to do, but only under the railroad condemnation statutes of the state, and as these railroad statutes, it is said by the plaintiffs, afford a more liberal and favorable measure of damages to the owners of property taken thereunder, the plaintiffs insist that in the present case they are discriminated against, as compared with the owners of property condemned by railroad companies in other cases, and that consequently they are being denied the equal protection of the laws guaranteed to them by the Federal Constitution. I cannot agree with this argument, which, I think is completely answered and overruled by the decision of the United States Supreme Court in Brown vs. United States, 263 U. S. 78. Under the principle applied in that case, I am satisfied that, in view of the object here sought to be accomplished by the state, the taking of this land must be regarded as a reasonable adaptation of proper means for the acquisition of this land for highway purposes and that the fact that such land is not to be physically used as a part of the highway thus sought to be constructed does not change the real nature of the transaction, which is the taking of land for the widening of a public highway. The same principle was announced and applied, under substantially similar circumstances, in Pitznogle vs. Western Maryland Railroad Co., 119 Md. 673, 87 Atl. 917, and Rogers vs. Bradshaw, 20 Johnson (N. Y.), 735. This condemnation proceeding is brought by the state, in its own interest and for its own public purposes, and not by, nor on behalf of, a railroad company; and its object is the condemnation and taking of property for the purpose of improving a public highway and not for any railroad purpose. There is, therefore, no sound basis for this contention that the proceedings here sought to be enjoined will result in either the denial of the equal protection of the laws or the deprivation of property without due process of law.

The constitution of Michigan permits, and the statutes of the state provide, a different procedure as between condemnation proceedings brought by the State and those brought by railroads or other public corporations, although such constitution requires, in all cases, that "private prop-
[fol. 105] erty shall not be taken * * * for public use

without the necessity therefor being first determined and just compensation therefor being first made or secured in such manner as shall be prescribed by law." In view of this broad guaranty of just compensation, which is observed and fulfilled by the statutes in question, there is nothing in the Federal Constitution which prevented the state of Michigan from the exercise of its own discretion and judgment in the adoption of the particular methods of enforcement of the right of eminent domain prescribed in the statutes here involved. A. Backus, Jr. & Sons vs. Fort Street Union Depot Co., 169 U. S. 557; Joslin Manufacturing Co. vs. Providence, 262 U. S. 668; Rindge Co. vs. Los Angeles County, supra.

I have examined with care all of the reasons and arguments presented by the plaintiffs in support of their claim that their rights are being invaded in respect to the matters urged and am clearly of the opinion that such claim is without merit and that the temporary restraining order now in effect must be dissolved, the application for an interlocutory injunction denied, and the bill dismissed.

Arthur J. Tuttle, District Judge.

Detroit, Mich., June 24, 1929.

I concur: Edward J. Moinet, District Judge.

Detroit, Mich., June 25th, 1929.

[fol. 106] In United States District Court

Before Hickenlooper, Circuit Judge, and Tuttle and Moinet, District Judges

Concurring Opinion

Hickenlooper, Circuit Judge:

I concur in the result reached by the majority of the court but cannot concur wholly in the reasoning whereby that result is attained. Under the circumstances of this case I feel that it must be conceded that the plaintiffs' property is being appropriated for railway purposes and not for a highway. It is being taken under the provisions of Act

340 of 1927 and this Act expressly provides for an appropriation for railway right of way. This is recognized by the Supreme Court of Michigan in the case of Johnstone v. D., G. H. & M. Ry. Co. et al. (Not yet officially reported), where the court says: "In determining plaintiffs' compensation, the benefits to their property, if any, arising from the construction and operation of the railroad, are proper to be considered." In Fitzsimmons v. Galvin, Inc. v. Rogers, State Highway Commissioner, 243 Mich. 649, the same Court had said: "The State is taking this land for use as a railroad right of way, the procuring of which is necessitated by the construction and improvement of a state trunk line highway." All parties concede that it is to railway uses to which the land is to be put.

Nor do I think that the authorities upon which the opinion of the majority is based (Brown v. U. S., 263 U. S. 78; Pitznogle v. Western Md. R. R. Co., 119 Md. 673) go further than to sustain the contention that the underlying need for relocating the railroad (Analogous to the necessity for procuring the townsite in the Brown case and the private road in the Pitznogle case) furnishes the element of public necessity and makes the appropriation one "for a public use" as distinguished from a taking for private use. Were the railway simply moved over adjacent the highway only for sufficient distance to permit both the widening of the highway and the continued maintenance of the railway in the vicinity and substantially in its former location there would be more reason to denominate the taking as one for highway purposes. But here the railway is being entirely relocated at some very considerable distance from its former location, over more than nine miles of its length, through lands of a very different character and [fol. 107] with additional appropriation for yards and buildings. To say that because a general highway improvement gives rise to the desirability or even necessity of so relocating the railway, the property needed is being taken for highway purposes, is to fail to distinguish between the impelling reason for condemnation and the use and purpose for which the lands are in fact taken and to which they will in fact be put.

As stated, the condemnation proceedings are brought under Act 340 of 1927 which authorizes the condemnation

of property for this particular project "in accordance with the general laws of the State of Michigan." The Supreme Court of Michigan has held this law constitutional under the State Constitution and construed it as permitting the State Highway Commissioner to proceed under the Highway Condemnation Acts (Act 352 of 1925 and Act 92 of 1927) rather than the Railway Condemnation Statutes 8249-8257, inclusive (Compiled Laws of 1915). This court is bound by the decision of the Supreme Court of the State upon these two points of compliance with the provisions of the State Constitution and the scope or construction to be given the Act.

It is the contention of the plaintiffs that by invoking the procedure provided for condemnation of land for highway purposes, but without negotiation for the purchase of the property before commencing the proceedings (declared jurisdictional in respect to both highway and railway condemnations In re Rogers, 243 Mich. 517; 220 N. W. 808), the State Highway Commissioner is administratively depriving the plaintiff land-owners of the equal protection of the laws in that the land is being taken for railway purposes and plaintiffs are being denied rights given to all other land-owners whose property is taken for railway purposes under the general Railway Condemnation Statutes. The rights of which they claim to be so deprived are (a) the right to jury trial both as to necessity and compensation; (b) the right to possession of their property until damages have been finally assessed and paid; (c) the right to consequential damages; (d) the right to damages without deduction of benefits; (e) the right to attorney's fees and expenses in addition to damages; and (f) the right to review by appeal instead of by restricted writ of certiorari.

The precise question is thus whether, by the adoption of the course pursued, the plaintiffs are being subjected to dis- [fol. 108] criminatory treatment and are being deprived of any substantial and substantive rights, which are given as of right to others in like situation, viz.: others whose property is being appropriated for public purposes, not necessarily for railway purposes. In this probably lies the fallacy of plaintiffs' position. It is now established beyond controversy that a state law, valid on its face, may be adimnistered in an unconstitutional manner so as to

justify the intervention of a court of equity. Yick Wo v. Hopkins, 118 U. S. 373; Reagan v. Farmers Loan & Trust Co., 154 U. S. 362; Greene v. Louisville, etc. Ry. Co., 244 U. S. 499. It is also equally well established that the guaranty of equal protection of the laws means the protection of equal laws, operating without discrimination upon all under the same or similar circumstances. Southern Ry. Co. v. Greene, 216 U. S. 400; A. T. & S. F. Ry. Co. v. Vosburg, 238 U. S. 56; Truax v. Corrigan, 257 U. S. 312; Power Mfg. Co. v. Saunders, 274 U. S. 490. The decisive question arises under the manner of classification of the plaintiffs in determining whether they are receiving equality of treatment.

The Legislature of the State of Michigan has enacted separate laws for the condemnation of property for almost all of the purposes for which such condemnation may be had. The legislature has now enacted still another general law (Act 215 of 1925) and a Special Act (Act 340 of 1927) covering the situation where a railway is to be relocated as part of a project for highway improvement. The Supreme Court of Michigan has construed these last mentioned acts and defined their meaning and scope. The plaintiffs do not contend that they are being deprived of their property without due process of law but only that they have the right to benefit by the procedure and remedial provisions of the railway Condemnation Statutes, as distinguished from the other statutes for appropriation of property which the State Supreme Court has held were to be read into Acts 215 and 340.

The contentions of discrimination and unequal protection are of several classifications. The alleged wrongs by denial of the right to consequential damages and by discrimination in the assertion of the right to deduct benefits, are more fanciful than real. The state courts have held that consequential damages and deduction of benefits are proper subjects for consideration only in that both are inseparable from a determination of the true damages suffered. The plaintiffs are entitled to no financial advantage but only to just compensation (Cf. McCoy v. Union Elev. R. Co., 247 U. S. 354; Bauman v. Ross, 167 U. S. 548), and there is no [fol. 109] reason to assume that the damages awarded will

not be fully compensatory. In this respect we cannot say that the action of the state will be discriminatory.

It was suggested by the oral argument but not raised in the briefs that the plaintiffs in the Dohany cases were also the owners of lands abutting the railroad right-of-way at its present location adjacent the highway and were now threatened with a deduction of the benefits which would accrue to that land by reason of the removal of the railroad and to their other lands, remote from the highway, by reason of increased means of access to the main artery of travel to Detroit. To the extent that the property is benefited by the construction of the railway it is manifest the extent of damage is affected but such benefits only as pertain to such construction may be considered, not such as arise from the removal of the railway from another location although it there also abuts land owned by the plaintiffs. Such latter benefits are not germane to the subject-matter of the litigation, which relates solely to the appropriation, and the consideration given benefits in fixing the amount of damage arising from such appropriation and the construction of the railway should exclude those benefits which are remote rather than direct. But there is no substantial reason to believe that such indirect, collateral and incidental benefits will in fact be deducted in the absence of any specific legislation authorizing it; and even if threatened there is even less reason to believe that the plaintiffs will not secure wholly adequate relief at law against the contention. The remedy at law being adequate, a court of equity should not take jurisdiction.

The contentions of the right to jury trial instead of a hearing before a properly constituted, constitutional tribunal of three commissioners, to less limited appeal privileges, the wholly statutory right to negotiation (held not to be provided for under Acts 210 and 340) and the legislative determination of necessity (held not to violate the State Constitution), all pertain to matters of procedure in which plaintiffs have no vested right to a continuance of past practices. "Each succeeding legislature may establish a different one, providing only that in each is preserved the essential elements of protection." Backus v. Union Depot Co., 169 U. S. 557, 570. When such essential elements are

so preserved, the most obvious being the right to a hearing before a proper tribunal, the determination of proper com-
[fol. 110] pensation and the payment or securing of payment of the compensation so determined, the property owner is deprived of no right to which he is entitled under the Federal Constitution.

The alleged discrimination by excluding attorney's fees and expenses from the measure of damage in this case, while making such allowances in other cases of condemnation for railway purposes, is much in the same category as matters of procedure. The right to attorney's fees and expenses, not usually forming part of the costs, is not a fundamental right. When allowed, the allowance is rather a matter of favor than of right. Upon this contention we consider the case of Joslin Mfg. Co. v. City of Providence, 262 U. S. 668, as conclusive and binding upon us. The plaintiffs are not denied a "right" given to others but complain because they are not also accorded a "gratuity" in some cases extended to others.

This leaves only the question of the possession of the property until compensation has in fact been paid. The Constitution of Michigan provides that property shall not be taken for public use without just compensation "being first made or secured." Article XIII, Section 1. The public necessity for appropriation being established it is entirely consistent with this provision and with the Federal Constitution to provide that immediate possession be taken and the public need and improvement be not delayed over a period of protracted litigation. Backus v. Union Depot Co., supra.

In substance, while differing from the conclusion of the majority of the statutory court that this is a taking "for highway purposes," I am of the opinion that by Acts 215 and 340 the state legislature has provided an individual procedure and method for the appropriation of property for railroad purposes to be followed in those cases, and those only, in which the primary necessity arises from a highway improvement and in which the land taken is to be used for exchange purposes. In providing this distinct procedure there is no violation of the due process clause, the plaintiffs are deprived of no fundamental rights, and I am unable to say that the initial or motivating cause being

in the highway improvement, the desirability of centralizing the control in the Highway Commissioner so that the whole work may proceed as a single project, the general diversity of separate laws for the appropriation of property in Michi-
[fol. 111] gan for the several different purposes, and the rather distinct and unique situation here present, do not afford reasonable ground for separate classification. The law would seem to go no further than the need, as the legislature saw it, and thus to afford no ground for claim of discrimination. Compare Barrett v. Indiana, 229 U. S. 26; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224; Perley v. N. Car., 249 U. S. 510.

I concur in the dismissal of the plaintiffs' bills.

[fol. 112] IN UNITED STATES DISTRICT COURT

In Equity. No. 3118

FRANK H. DOHANY, Plaintiff,

vs.

FRANK F. ROGERS, State Highway Commissioner, et al.

DECREE—June 25, 1929

By Tuttle, J.:

The Order to Show Cause heretofore issued herein, and Motion to Dismiss Bill of Complaint, having been heretofore duly argued and submitted and the Court having taken time for mature deliberation thereon, and being fully advised in the premises, do now here Order, Adjudge, and Decree that the Restraining Order heretofore issued herein, be, and the same is hereby vacated and set aside, and Bill of Complaint dismissed, for reasons set forth in the written Opinion this day filed herein.

Entered June 25th, 1929.

Tuttle, J.

[fol. 113] IN UNITED STATES DISTRICT COURT

Title omitted

PLAINTIFF'S ASSIGNMENT OF ERRORS—Filed July 24, 1929

Now comes the plaintiff in the above entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above entitled cause from the order and decree made by this Honorable Court on the 25th day of June, 1929:

1

The Court erred in refusing to grant an interlocutory injunction pending a hearing on the merits of the case.

2

The Court erred in its finding that plaintiff had not been deprived of his property without due process of law.

3

The Court erred in its finding tht plaintiff had not been denied the equal protection of the laws.

4

[fol. 114] The Court erred in dismissing plaintiff's bill of complaint.

5

The Court erred in entertaining the defendants' motions to dismiss plaintiff's bill of complaint at the three judge statutory hearing, because the three judges comprising such tribunal were convened for the single purpose of granting or denying plaintiff's motion for an interlocutory injunction, and were without jurisdiction to hear such motions to dismiss or to enter a final decree dismissing plaintiff's bill of complaint.

6

The Court erred in vacating the temporary restraining order theretofore issued in the case, there being no jurisdiction to dissolve such restraining order.

7

The Court erred in entering the order and decree dismissing plaintiff's bill, vacating the restraining order and refusing to grant plaintiff's application for an interlocutory injunction, because District Judge Tuttle was without jurisdiction to enter such order and decree, the three judges comprising the tribunal who heard plaintiff's motion for an interlocutory injunction having not evidenced their assent thereto by their signatures or by their announcement in open court with such three judges sitting and directing the tested order and decree.

8

The Court erred in failing to find that Act 215, of the Public Acts of 1925, of Michigan, is void, because it denies to the plaintiff the equal protection of the laws, and deprives him of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

9

The Court erred in failing to find that Act 340 of the Public Acts of 1927, of Michigan, is void, because it denies to the plaintiff the equal protection of the laws and deprives [fol. 115] him of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

10

The Court erred in failing to find that Act 352, of the Public Acts of 1925, as amended by Act 92, of the Public Acts of 1927, of Michigan, is void, because it denies to the plaintiff the equal protection of the laws and deprives him of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

11

The Court erred in failing to find that Section 2 of Act 215, of the Public Acts of 1925, of Michigan, was void,

because it allowed the State Highway Commissioner to launch his condemnation proceedings in a highway condemnation tribunal instead of a railway condemnation tribunal, thereby depriving plaintiff of the equal access to the railway condemnation tribunal, as enjoyed by all others similarly situated, and thereby denying to the plaintiff the equal protection of the laws.

12

The Court erred in failing to find that Section 2 of Act 215, of the Public Acts of 1925, of Michigan, specifically authorized the State Highway Commissioner to deny to the plaintiff the equal protection of the laws by allowing him to arbitrarily select either the general highway condemnation act, or the public corporations and state agencies condemnation act, under which to proceed to condemn plaintiff's property.

13

The Court erred in failing to find that Section 2 of Act 15, of the Public Acts of 1925, of Michigan, allowed arbitrary selection and classification by a state administrative officer, thereby denying to plaintiff the equal protection of the laws.

[fol. 116]

14

The Court erred in failing to find that Section 4 of the Act 340, of the Public Acts of 1927, of Michigan, authorized the State Highway Commissioner to institute proceedings to condemn plaintiff's property in accordance with the general laws of the State, not designating which general condemnation law, but allowing the State Highway Commissioner to arbitrarily select the general law under which he desired to proceed, thereby denying to the plaintiff the equal protection of the laws.

15

The Court erred in failing to find that, even though Act 352, of the laws of 1925, as amended by Act 92, of the laws of 1927, of Michigan, be fair on its face, and impartial in appearance, yet, in this case, it is being applied and admin-

istered by the State Highway Commissioner, one of the defendants, with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between plaintiff and others in similar circumstances, that the proceedings under it are void, and that said defendant should be restrained from continuing such proceedings.

16

The Court erred in its failure to find that Act 340, of the Public Acts of 1927, of Michigan, allowed the State Highway Commissioner to arbitrarily discriminate against plaintiff in invoking proceedings under any one of the many general condemnation laws of the state, thereby denying to plaintiff equal protection of the laws.

17

The Court erred in its failure to find that, the action of the State Highway Commissioner denied plaintiff the equal protection of the laws by arbitrarily selecting the "highway condemnation statute," under which to institute proceedings, instead of the "Railway condemnation act" or the public corporations and state agencies act.

[fol. 117]

18

The Court erred in its failure to find that Section 2 of Act 215, of the Public Acts of 1925, of Michigan, specifically authorized the State Highway Commissioner to arbitrarily select as to whether he would invoke the liberal terms of the public corporations and state agencies act, or whether he would proceed under the stringent highway condemnation act, thereby allowing arbitrary selection in the enforcement of the laws, and denying plaintiff the equal protection of the laws.

19

The Court erred in its failure to find that Section 4 of Act 340, of the Public Acts of 1927, of Michigan, authorized arbitrary selection, not based upon a finding or judicial determination, on the part of the State Highway Commissioner, in choosing a condemnation law, under which to

proceed, thereby denying plaintiff the equal protection of the laws.

20

The Court erred in its failure to find the method used by the State Highway Commissioner in carrying out the provisions of Act 340, of the Public Acts of 1927, of Michigan, denied plaintiff the equal protection of the laws and deprived him of property without due process of law.

21

The Court erred in its failure to find that a law authorizing arbitrary selection by an administrative officer in carrying out the laws, was void upon its face.

22

The Court erred in its failure to find that one of the tests as to whether Section 2 of Act 215, of the Public Acts of 1925, of Michigan, denied plaintiff the equal protection of the laws, was whether or not the condemnation acts therein designated provided for different elements and measures of damages.

[fol. 118]

23

The Court erred in its failure to find that Act 340, of the Public Acts of 1927, of Michigan, set up no process of law, but allowed the Highway Commissioner to select any one of many condemnation processes, thereby denying plaintiff that equal protection of the law and the due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution.

24

The Court erred in its finding that Act 352, of the Public Acts of 1925, as amended by Act 92, of the Public Acts of 1927, of Michigan, prescribed procedure applicable to taking land to be used for railroad purposes.

25

The Court erred in failing to find that if such highway acts provide such a taking of property for railway pur-

poses, then there are two or more general laws applicable to such taking, each prescribing different procedure and each allowing different measures of damages contrary to the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

26

The Court erred in its failure to find that when there are two or more laws applicable to the taking of private property for public use, each law providing for different processes, safeguards, privileges and immunities, and each law providing for a different measure of damages, and, that, when an administrative officer elects to proceed to condemn lands under the act allowing the fewest safeguards, privileges and immunities, and the smallest measure of damages, then such action denies the landowner the equal protection of the laws.

27

The Court erred in its finding that the ultimate use to which the property was to be put was not the factor which should designate the type of condemnation proceedings, or [fol. 119] the tribunal in which it should be launched.

28

The Court erred in finding that the taking in this case, by the State, of private property, to be traded to another for railway purposes, and pursuant to a contract was a public use.

29

The Court erred in its failure to find that the taking of the property for trading purposes was a taking of private property for a private use, thereby depriving plaintiff of his property without due process of law.

30

The Court erred in its finding that the taking of private property by the State to be traded to a railway company, which railway company had the right to exercise the

power of eminent domain within itself, was a taking for a public use.

31

The Court erred in its finding that the taking of plaintiff's property upon which a railroad is to be located was a taking for public highway purposes.

32

The Court erred in its finding that the re-location of the Grand Trunk railway tracks was so closely connected with the public highway project as to justify the taking of Plaintiff's land under the highway act.

33

The Court erred in its finding that it was necessary to re-locate the railway tracks by the State in any case; there being power in the railway company for that purpose.

34

The Court erred in its finding that the taking of plain-
[fol. 120] tiff's property under the highway act, by the State, for the purpose of trading such property to the railway company for railway purposes, deprived plaintiff of his property without due process of law and denied him the equal protection of the laws.

35

The Court erred in its finding that the re-location of the railway tracks was a part of the public highway project.

36

The Court erred in its finding that this case was governed by the principles of law laid down in the case of Brown v. United States, 362 U. S. 78.

37

The Court erred in its failure to find that Act 340, of the Public Acts of 1927, of Michigan, arbitrarily selected

certain property owners from a general class, thereby denying them the equal protection of the general laws of the State of Michigan, contrary to the equality clause of the Fourteenth Amendment to our Federal Constitution.

38

The Court erred in its failure to find that Act 340, of the Public Acts of 1927, of Michigan, arbitrarily withdrew plaintiff from the general class of persons whose property is condemned for railway purposes, thereby denying him the equal protection of the laws.

39

The Court erred in its finding that the State had authority to exercise its own discretion and judgment in adopting methods of the enforcement of the power of eminent domain regardless of the general laws of the State; such exercise of discretion being a denial to the plaintiff of the equal protection of the laws.

40

The Court erred in its failure to find that the State of [fol. 121] Michigan cast away its mantle of sovereignty, and became the agent of the railway company, when said State entered into a contract, thereby undertaking to acquire land upon which to re-locate the tracks of said railway company, by purchase or condemnation, pursuant to Act 340, of the Public Acts of 1927, of Michigan.

41

The Court erred in its failure to find that the State could not prescribe special laws to be used by it in taking private property for railway purposes, which laws were not applicable to all such proceedings to take property for railway purposes.

42

The Court erred in its failure to find that the State, by depriving plaintiff of the right to demand a jury trial,

which right is enjoyed by all others whose property is taken for railway purposes, thereby denied plaintiff such equal protection of the laws.

43

The Court erred in its failure to find that the denying of attorney fees and expenses and right of general appeal to our Supreme Court to plaintiff, while allowing them to all other persons whose property is taken for railway purposes, denied plaintiff the equal protection of the laws.

44

The Court erred in its failure to find that Section 4 of Act 340, of the Public Acts of 1927, of Michigan, legislatively declared the taking of plaintiff's property to be a public necessity, contrary to the Constitution and adjudicated cases of Michigan, thereby denying to the plaintiff the equal protection of those fundamental provisions enjoyed by all others whose property is taken for public use, contrary to the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

[fol. 122] 45

The Court erred in its finding that plaintiff would receive that measure of compensation guaranteed by the equality clause of the Fourteenth Amendment to the Federal Constitution, although the benefits accruing by virtue of the public enterprise will be assessed and deducted from plaintiff's award, while in no other case under similar circumstances could such deduction of benefits from the award be made.

Wherefore the plaintiff and appellant prays that said decree be reversed and that said District Court for the Eastern District of Michigan, Southern Division, In Equity, be ordered to enter a decree reversing the decision of the lower court in said cause, and to reinstate plaintiff's bill of complaint.

Dohany & Dohany, Attorneys for Plaintiff and Appellant.

[File endorsement omitted.]

[fol. 123] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFF'S PETITION FOR APPEAL—Filed July 24, 1929

To the Honorable Arthur J. Tuttle, United States District Judge; the Honorable Charles C. Simons, United States District Judge, or the Honorable Edward J. Moinet, United States District Judge:

The above named plaintiff, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 25th day of June, A. D. 1929, in which the Court vacated and set aside the restraining order heretofore issued herein, dismissed plaintiff's bill of complaint and failed to allow plaintiff's application for an interlocutory injunction, does hereby appeal from said decree to the [fol. 124] Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington, under the rules of such Court in such cases made and provided.

This appeal is taken direct to the Supreme Court of the United States under the Judicial Code, Section 238, amended, and by virtue of the provisions of the Judicial Code, Section 266, amended; such portions of the Judicial Code, section 266, amended, reading as follows: "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case." And "a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

And your petitioner further prays that the proper order relating to the required security to be required of him be made.

Frank H. Dohany, Plaintiff.

[File endorsement omitted.]

[fol. 125] IN UNITED SATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—July 24, 1929

On motion of Dohany & Dohany, solicitor and counsel for plaintiff, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, if any, exhibits, stipulations, and all proceedings, be forthwith transmitted to said Supreme Court of the United States. It is further ordered that the bond on appeal be [fol. 126] fixed at the sum of $500.00 for costs on appeal and not to act as a supersedeas bond.

Dated July 24th, 1929.

Arthur J. Tuttle, District Judge.

Entered July 24, 1929.

[fols. 127 & 128] Bond on appeal for $500.00, approved and filed July 24, 1929, omitted in printing.

[fols. 129 & 130] Citation, in usual form, showing service on Wilbur M. Brucker et al., omitted in printing.

[fol. 131] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Aug. 3, 1929

To the above-named defendants and appellees:

Please take notice, that the within Præcipe indicates the portions of the record which appellant desires to be incorporated into the transcript on appeal.

Dohany & Dohany, Attorneys for Appellants. Business address: 1021-23 Hammond Building, Detroit, Michigan.

[fol. 132] [Title omitted]

Præcipe Indicating the Portions of the Record to be Incorporated Into the Transcript

To the Clerk of said Court:

You are requested to take a transcript of the Record to be filed in the Supreme Court of the United States, pursuant to an appeal, allowed in the above entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to-wit:

1. A complete list of the Calendar entries.

2. Plaintiff's bill of complaint, together with plaintiff's Exhibits A and B attached thereto and made a part thereof, including the petition of Frank F. Rogers, filed in the Probate Court of Oakland County, Michigan, file number 23584, and the order of Probate Judge Dan A. McGaffey made October 4, 1928.

3. Plaintiff's motion for a temporary injunction and notice of hearing. (Clerk—Found only in prayer of Bill of Complaint.)

[fol. 133] 4. The restraining order and order to show cause why an interlocutory injunction should not issue, returnable December 17, 1928.

5. Answer of Defendant Frank F. Rogers, and motion to dismiss plaintiff's bill of complaint.

6. Notice of Hearing on defendant's motion to dismiss (Clerk—Not filed of record.)

7. Joint and several answer of Detroit, Grand Haven & Milwaukee Railway Company and the H. W. Nelson Company, and motion to dismiss plaintiff's bill of complaint.

8. Notice of hearing January 21, 1929, on motion to dismiss.

9. Opinions of the Court recommending that the temporary restraining order be dissolved, and interlocutory injunction be refused, and bill of complaint be dismissed.

10. Decree vacating temporary restraining order and dismissing plaintiff's bill of complaint.

11. Plaintiff's petition for order allowing appeal.

12. Order allowing plaintiff's appeal.

13. Plaintiff's assignment of errors.

14. Citation on plaintiff's appeal.

15. Plaintiff's præcipe indicating the portions of the record to be incorporated in the transcript.

16. Plaintiff's bond on appeal.

17. Appearance of defendant Frank F. Rogers, by Wilber M. Brucker, Attorney General, and Kit F. Clardy, Assistant Attorney General.

18. Appearance of defendant Detroit, Grand Haven & Milwaukee Railway Company and H. W. Nelson Company by H. R. Martin and H. V. Spike. (Clerk—No formal appearance filed of record.)

[fols. 134 & 135] Respectfully, etc., Dohany & Dohany, Attorneys for Appellant. Business address: 1021-23 Hammond Building, Detroit, Michigan.

Due and timely service of copy of the within præcipe, and Notice thereof, is hereby accepted on behalf of defendants.

Frank F. Rogers, Wilber M. Brucker, K. F. Clardy, Attorney- for Defendants and Appellees.

Due and timely service of copy of the within Præcipe, and Notice thereof, is hereby accepted on behalf of defendants Detroit, Grand Haven and Milwaukee Railway Co., & H. W. Nelson Co.

Dated August 1, 1929.

H. R. Martin, H. V. Spike, Attorney- for Defendants and Appellees.

[File endorsement omitted.]

[fol. 136] In Supreme Court of the United States

To the above-named appellees:

Please take notice that attached hereto you will find a definite statement of the points upon which the Appellant intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof.

Yours, etc. Frank H. Dohany, Socilitor for Appellant. Business address: 1021-23 Hammond Building, Detroit, Michigan.

Dated August 29, 1929.

[fol. 137] IN SUPREME COURT OF THE UNITED STATES

DEFINITE STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY AND OF THE PARTS OF THE RECORD WHICH HE THINKS NECESSARY FOR THE CONSIDERATION THEREOF—Filed Sept. 6, 1929

To the Clerk of said Court:

Please take notice that Appellant in the above-entitled cause intends to rely upon each and every point set up and designated in his assignment of errors, which is attached hereto and made a part hereof.

The parts of the record which the Appellant thinks necessary for the consideration of the points hereinbefore designated, and upon which he intends to rely, are as follows:

1. Docket entries of the District Court.
2. Plaintiff's Bill of Complaint and Exhibits "A" and "B."
3. Restraining Order and Order to Show Cause why an Interlocutory Injunction should not issue.
4. Answer of Defendant, Frank F. Rogers.
5. Answer of Defendants, Detroit, Grand Haven & Milwaukee Railway Company, and the H. W. Nelson Company.
6. Opinion, Tuttle, D. J., and Moinet, D. J.
7. Opinion, Hickenlooper, C. J.
8. Decree of the District Court.
9. Plaintiff's Assignment of Errors.

[fols. 138 & 139] 10. Petition for Appeal.

11. Order Allowing Appeal.
12. Bond on Appeal.
13. Citation.
14. Præcipe Indicating Portions of Record to be Incorporated into Transcript of Record.
15. Definite Statement of the Points on which Appellant Intends to Rely, and of the parts of the Record which He thinks Necessary for the Consideration Thereof, and Notice.

16. Statement Particularly Disclosing the Basis on which it is Contended This Court Has Jurisdiction to Review on Appeal the Decree Below.

Yours, etc., Frank H. Dohany, Solicitor for Appellant. Business address: 1021-23 Hammond Building, Detroit, Michigan.

Dated August 29, 1929.

Due and timely service of a copy of the within definite statement of the points on which Appellant intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof is hereby accepted on behalf of the Appellee, Frank F. Rogers.

Wilber M. Brucker, Attorney General of Michigan, Solicitor for Appellee, Frank F. Rogers.

Dated Aug. 30, 1929.

Service of a copy of the within definite statement of the points on which Appellant intends to rely, and of the parts of the Record which he thinks necessary for the consideration thereof is hereby accepted on behalf of the Appellees, Detroit, Grand Haven & Milwaukee Railway Company, and the H. W. Nelson Company.

H. R. Martin & H. V. Spike, Solicitors for Appellees Detroit, Grand Haven & Milwaukee Railway Company and the H. W. Nelson Company.

Dated Aug. 31, 1929.

Assignment of errors omitted; printed side page 113 ante.

[fols. 140-143] [File endorsement omitted.]

Endorsed on cover: File No. 34,469. E. Michigan D. C. U. S. Term No. 338. Frank H. Dohany, appellant, vs. Frank F. Rogers, State Highway Commissioner for the State of Michigan, et al. Filed August 22d, 1929. File No. 34,469.